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In The
Supreme Court of the United States

October Term 1995

CHRISTINE SOLEM,

Petitioner,

v.

J. CARLTON COURTER, III, Commissioner of Agriculture and Consumer Services,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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24pp

QUESTIONS PRESENTED

No. 1 Whether the Fourth Circuit is in conflict with Migra v. Warren City School District Board of Education, 465 U.S. 75(1984), with the respect to the Constitution's Full Faith and Credit Clause, thus denying a litigant the opportunity to present his federal claim in federal court, when in fact he would not be prevented from presenting his federal claim in state court under that particular state's claim preclusion law.

Virginia has adopted Regulations Governing Grade A Milk, based on the Grade A Pasteurized Milk Ordinance--1989 Recommendations of the United States Public Health Service/Food and Drug Administration, the purpose of which is to "encourage a greater uniformity and a higher level of excellence of milk sanitation practice in the United States", and, "to facilitate the shipment and acceptance of milk... of high sanitary quality in interstate and intrastate commerce." The language of this ordinance, employed by the Virginia regulations in regulation No. VII, states in pertinent part, "a person may sell..only grade A pasteurized milk to the final consumer." The State has applied regulation VII to prohibit incidental, on-farm sales of a farmer's excess ungraded raw goats' milk to friends and neighbors, who unsolicited, approach the farmer to purchase the milk for their own consumption. Thus, the further questions presented are:

No. 2 Whether the police power of the State to regulate should extend to a total prohibition of the above described sales, or is this an unreasonable violation of liberty of contract and personal property rights protected by the Fourteenth Amendment Due Process Clause.

No. 3 Whether the small diversified farmer, dependent on the sum of all such incidental sales of agricultural products, has unreasonably been denied his right to make a living from his land under the same Fourteenth Amendment Clause above.

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IN THE SUPREME COURT OF THE UNITED STATES
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CHRISTINE SOLEM,
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COMMISSIONER OF AGRICULTURE
AND CONSUMER SERVICES
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Christine Solem respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported and is reproduced in an appendix to this brief on page 1-3. (hereinafter cited "App., p. ___") The opinion of the district court is also unreported and is reproduced at App., p. 4-13.

JURISDICTION

The court of appeals entered its judgment on August 18, 1995 (App., p.1). A petition for rehearing and suggestion for rehearing in banc were denied September 25, 1995 (App., p. 15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY, CONSTITUTIONAL, AND REGULATORY PROVISIONS INVOLVED

1. The Full Faith and Credit Clause of the United States Constitution, Art. IV § 1 is implemented by the federal full faith and credit statue, 28 U.S.C. § 1738 and reads in pertinent part:

> "such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

2. The relevant portion of the Fourteenth Amendment Section 1 to the Constitution of the United States is: "..nor shall any State deprive any person of life, liberty, or property, without due process of law..."

3. The specific portion of Virginia's Regulations Governing Grade A Milk, applied to prohibit Petitioner from selling ungraded raw goats' milk from her farm under the circumstances outlined in this petition is:

> ":..a person may sell in, offer for sale in, or expose for sale in the Commonwealth only grade A pasteurized, ultra-pasteurized, or aseptically processed milk or milk products to the final consumer, or to restaurants, soda fountains and grocery stores..." (App., p. 102)

The entire Regulations Governing Grade A Milk are reproduced in the Appendix as well, as each provision therein must be complied with, or Petitioner may not sell goats' milk,

pasteurized or otherwise, under the circumstances outlined in this petition.

STATEMENT

A. Proceedings Below

Petitioner, Christine Solem, filed a complaint for declaratory relief in federal district court for the western district of Virginia, August, 1994 against J. Carlton Courter, III, Commissioner of Agriculture and Consumer Services, State of Virginia, alleging that regulation VII of Virginia's Regulations Governing Grade A Milk is unconstitutional as applied to prohibit certain incidental, on-farm sales of ungraded raw goats' milk. Jurisdiction for the federal court arose under the Fourteenth Amendment, Section 1, of the U.S. Constitution and U.S.C., Title 28 § 1331, as the complaint alleged that since the type of sales involved were not substantially related to the public health, that their absolute prohibition was an unreasonable violation of liberty of contract and personal property rights protected under the Fourteenth Amendment Section 1 (Due Process Clause). The complaint also alleged, under the same Constitutional Amendment, that Solem was being denied the use of her land to sustain herself and make a living, and that the wording of regulation VII was unconstitutional when applied to said sales. (App., p. 119-121)[1]*

Defendant, Courter, filed a motion to dismiss/summary judgment, raising the affirmative defense of res judicata and claiming that the court lacked jurisdiction over the subject matter. The magistrate judge granted the Defendant's motion as a matter of law in a pretrial hearing, December, 1994, agreeing with all the State's contentions with regards to

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* Petitioner includes the complaint (minus the exhibit) in this Appendix, as the nature of the complaint has not been portrayed correctly in the lower court opinions.

Solem's claim, and specifically citing the case of Migra v. Warren City School District Board of Education, 465 U.S. 75, in ruling on the Defendant's res judicata defense. (specifically, App. p. 7).

Solem appealed to the Fourth Circuit Court of Appeals claiming, inter alia, that;

> 1. The lower court had confused the two preclusion concepts--claim preclusion and issue preclusion--under res judicata, which resulted in the application of an erroneous legal standard to the facts, and a failure to apply Virginia's claim preclusion law as required by Migra.
>
> 2. The case should not have been dismissed on a pretrial motion to dismiss/summary judgment as there were unresolved questions of mixed law and fact arising from the manner in which the complaint was drawn, most notably:
>
> a. Whether the unsolicited, incidental, on-farm sale described in the complaint constitutes a sale to the "public".
>
> b. Whether it is unreasonable to apply regulations designed for commercial enterprises to home farm products sold in such a manner so as to be categorized an agricultural pursuit.
>
> c. Whether it is unreasonable to absolutely prohibit the sale of ungraded raw goats' milk under the circumstances outlined in the complaint when it is perfectly legal to give it away. (Solem's formal brief to the Fourth Circuit, p. 24-28).

Without addressing any other issues, and without reviewing or analyzing Virginia's law of claim preclusion, the Fourth Circuit affirmed the judgment below on the basis of Migra, supra., stating that Solem had had ample opportunity to litigate her claim in state court proceedings; however, the

opinion did not purport to apply state (Virginia) claim preclusion law as required by Migra.

Solem petitioned for a rehearing and suggested a rehearing in banc, citing a conflict between the Fourth Circuit's application of Migra in Solem v. Courter and Jones v. Poindexter, 903 Fd 2d 1006 (4th Cir, 1990). In the Jones case, supra., at 1010, the Fourth Circuit took special note of Virginia's claim preclusion law, defining Virginia's definition of "claim" as, 'When the same evidence is necessary to prove two claims, both claims are part of the same cause of action;' Brown v. Haley, 233 Va. 210, 355 S.E. 2d 563, 567 (1987). 'The barring of a cause of action which could have been litigated is...directed...to a claim which, if tried separately, would constitute claim-splitting.' Bates v. Devers, 214 Va. 667, 202 S.E. 2d 917, 920-21 (1974).

Solem pointed out that her federal claim constituted a different cause of action from either of her two previous cases (see history of case infra.) as evidence from neither of the two cases would support her current federal claim. The petition for rehearing and suggestion for rehearing in banc were denied without comment.

B. History of the Case

For twenty-two years, in Albemarle County, Virginia, Petitioner has owned a ten acre farm which produces market vegetables, and upon which she keeps roughly 12 dairy goats for milk, cheese, butter, meat and fertilizer, and 10 chickens for eggs, meat, and fertilizer. The farm provides food for the Petitioner and a partial living from the land.

From 1975-1979 Petitioner sold milk at the Blue Mountain Health Food Store in Charlottesville, Va., marking it "not for human consumption", as an individual in the health department had told her that raw milk could not be sold in Virginia for human consumption, and Petitioner thought that if it was marked in this manner that that would be legal. (App.

from Carbaugh v. Solem, 225 Va. 310, 302 S.E. 2d 33(1983), filed as part of the record in the district court, p. 77, 170.)

In November of 1979 Petitioner/Solem was ordered to stop the sales by an inspector with the Virginia Department of Agriculture and Consumer Services. Solem began renting her goats at the farm so that people might legally have the milk, as there were several people who needed the milk, including a baby allergic to cow and soy milk. (App. of Carbaugh v. Solem, Id, p. 102-105)

In July of 1980 the Department of Agriculture and Consumer Services and the Health Department, State of Virginia, filed an injunctive proceeding against Solem in the Albemarle Circuit Court, charging her with selling milk in violation of Regulation X of the Rules and Regulations Governing the Production, Processing and Sale of Grade A Pasteurized Market Milk and Grade A Pasteurized Market Milk Products and Certain Milk Products. Solem claimed in her defense that she was renting the goats, which did not constitute a sale of milk. Evidence presented included goat leasing papers, and testimony from persons leasing the goats. (App. from Carbaugh v. Solem, supra., p. 100-123, 163) But the judge refused the request for an injunction, ruling that Solem had not placed the milk in commerce and that he was unwilling to say that a customer should be protected from himself when he knew what he was getting and was asking for it. There was no ruling as to whether or not the renting of goats was a sale of milk. (Joint Appendix, filed in Solem v. Courter in the Fourth Circuit, p. 90-93)

The State appealed to the Virginia Supreme Court and in the case reported as Carbaugh v. Solem, Id. Solem's leasing program was determined to be a sale; a single sale, no matter how limited or restricted, was determined to be unlawful, and an injunction was mandated and signed. (Joint App., Solem v. Courter, p. 11)

Since the State had acknowledged that raw goats' milk could be given away, (Joint App., Solem v. Courter, p. 50)

Solem then gave the milk away to people who came to the farm and wanted it. But this practice was unworkable as the people insisted on paying and began devising strategies to achieve their goal, and Solem was under injunction and at risk. (Joint App., Solem v. Courter, p. 56) She therefore filed a declaratory action against the same two above parties, which was tried in 1986, asking the Albemarle Court to declare the legality of selling shares in a goat, so that a person could have the milk, the theory being that if the person owned the goat, he owned the milk, thus no sale, and Solem would not be in violation of the regulations. Evidence presented included bills of sale to prove that persons had purchased the shares. (App. of Kenley v. Solem, 237 Va. 202, 375 S.E. 2d 532 (1989) filed in district court as part of the record)

Once again Solem prevailed in the state trial court with the judge ruling that the selling of shares in the goats was not a sale, since title to the animal had passed and the owner was entitled to a portion of the milk. The State again appealed to the Virginia Supreme Court and the victory was overturned, the court acknowledging the formal transfer of the interests in the goats, but finding flaws in the handling of the milk and the dealings with the customers that made the distribution of the milk essentially a sale. (Kenley v. Solem, Id.)

In 1993 Regulations Governing Grade A Milk was adopted, superseding the Rules and Regulations Governing the Production, Processing and Sale, etc. . The parties are in dispute as to whether Solem is still subject to the 1983 injunction based on the prior regulation. (Joint App., Solem v. Courter, pp. 3, 6, 7, 9, 20, 60, 61, 88, 89)

The current federal suit has been filed as Regulations Governing Grade A Milk, irregardless of the validity of the injunction, still prohibit Petitioner from selling ungraded raw goats' milk for human consumption under the circumstances outlined in her complaint.

Reasons for Granting the Petition

The decision below on res judicata is erroneous and thus prevents a hearing on the merits of Petitioner's substantive claim. Petitioner's substantive claim is an important one to be addressed by this Court as it concerns incidental sales, their necessity to the life of small diversified farms anywhere in this country, and whether the regulatory power of the State has the authority, under the United States Constitution, to snuff out that life. The Pasteurized Milk Ordinance is a federal law adopted by all fifty states, but applied in a conflicting manner from state to state with regards to incidental, on-farm sales. The interpretation of this law should be clarified by the Court so that it is not misused in an unconstitutional manner. Virginia has applied this ordinance in a manner which has led to oppressive and absurd consequences. Under the state's application, it is illegal even for a farmer to sell a quart of his own raw goat's milk to his own mother or father.

I. The Decision of the Fourth Circuit Concerning Res Judicata is Erroneous, in Conflict with the Constitution's Full Faith and Credit Clause, The Supreme Court, All other Circuits, and Itself

A. The Fourth Circuit Erroneously Applied the Rule That Any Claim That Could Have Been Presented in Earlier State Litigation is Barred from Assertion in a Subsequent Federal Case.

The merits of Petitioner's substantive claim were not reached by the Fourth Circuit as the court affirmed the opinion of the district court, stating that Solem is precluded from raising her Fourteenth Amendment due process claim in

Federal Court under Migra v. Warren City School District Board of Education, 465 U.S. 75(1984).

Above all, the Migra case, supra. was an affirmation of the Constitution's Full Faith and Credit Clause.

> "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."

Migra, supra., at 81(emphasis added) As such, the Migra case, supra. was a culminating decision, resolving conflicts in the circuits below as to whether or not claim preclusion was applicable to a §1983 litigant who could have raised a federal claim in earlier state court proceedings, but did not. (Migra, supra., at 83)

After the Migra decision, the circuits fell in line, citing the precedent; the conflict was resolved. State rules of claim preclusion must apply. There occurred a total of over 300 cases under Migra in the various Circuit Courts of Appeals, all applying, as Migra instructed, the state preclusion law of the particular state in question. The Fourth Circuit itself had fourteen such cases under Migra, in which either South Carolina, North Carolina, Maryland or Virginia claim preclusion law was respectively analyzed and applied.

It is clear, however, that in the instant case that neither the federal district court nor the Fourth Circuit on appeal considered Virginia's claim preclusion law in Solem v. Courter. Not only is there not a single Virginia case cited in these opinions, but also the language of the Fourth Circuit expressly adopts a standard unrelated to (and in fact contrary to) the State law rule. The Fourth Circuit opinion states,

> "Because it is more important to give full faith and credit to state court judgments than ensure separate forums for federal and state claims, Solem is precluded from raising claims that she had ample opportunity to litigate in her state court proceedings."

But, the question does not turn on whether Solem had ample opportunity to litigate her claim in state court proceedings; rather the question turns on whether, under Virginia claim preclusion law, she was required to take that opportunity to raise her claim, or be barred.

To construe Migra as simply prohibiting under the rubric of "claim preclusion" a federal claim to be raised in federal court when it could have been raised in previous state court proceedings without analyzing the applicable state's claim preclusion law is directly in conflict with Migra. This is a serious error, neither technical nor harmless, as Petitioner is being denied her opportunity to litigate her federal claim. This case thus raises an important federal question, as the application, or lack thereof, of the Constitution's Full Faith and Credit Clause is intrinsic to the denial.

The error is particularly unjust when viewed in light of the fact that the very principle affirmed in Migra. establishing a uniform rule as to preclusion of a federal claim in federal court following state court proceedings, has now been abandoned under the cover of Migra. So that fairness, consistency, and confidence in the legal system may be maintained, the Supreme Court should grant this petition so that this error does not stand.

B. Petitioner's Claim Should Not Be Precluded in Federal Court as It Would Not Be Precluded in State Court

It is of note that Virginia claim preclusion law has already been analyzed by the Supreme Court in Haring v. Prosise, 462 U.S. 306 (1983). A footnote at 315 states:

> "..the courts of Virginia apply different rules of preclusion to matters arising in a suit between the same parties and based upon the same causes of action as those involved in the previous proceeding. Under the doctrine of res judicata, 'the judgment in the former (action) is conclusive of the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered.' ...THIS DOCTRINE DOES NOT APPLY, HOWEVER, ...TO A LATER ACTION BETWEEN THE SAME PARTIES ON A DIFFERENT CLAIM OR DEMAND..." (Emphasis is Petitioner's, citations omitted)

Haring v. Prosise, supra. does not address exactly what Virginia law defines as a cause of action/claim. However this definition is made clear by the Fourth Circuit in Jones v. Poindexter, 903 F 2d 1006, supra. Jones uses two Virginia cases to lock in the definition at 1010:

> No. 1. Brown v. Haley, 233 Va. 210, 355 S.E.2d 563,567(1987) states that where the same evidence is necessary to prove two

claims, both claims are part of the same cause of action.

Since Petitioner/Solem's current constitutional claim is not resting on goat leasing papers or bills of sale proving ownership of shares in a goat, under Virginia law, it is a different cause of action. (See statement, History of the Case, supra. to corroborate this statement and those immediately below)

No. 2. Bates v. Devers, 214 Va. 667, 202 S.E. 2d 917, 920-21(1974) states,

"The barring of a cause of action which could have been litigated is...directed...to a claim which, if tried separately, would constitute claim-splitting."

The Jones v. Poindexter case supra., was specifically pointed out by the Petitioner as conflicting in reference to her own case. (See Statement, Proceedings Below, supra.) The Fourth Circuit had already construed the Virginia claim preclusion rule in the Jones case supra. in such a way as to make clear that it would not apply in the circumstances of Petitioner's case. In Jones, the Court correctly found the Virginia law to be that a claim would be precluded in later litigation only if it were the same claim, in the sense that it relied on the same evidence as earlier asserted so that it would violate the rule against splitting a single cause of action.

The Court below violated the federal mandate of Migra by applying a completely different (and presumably federal rule), namely, that a claim is precluded if the litigant had the opportunity of raising it in earlier litigation even if such a claim would not be barred by State court. Here the Constitutional claims were not raised in earlier litigation, but do not rely on the same evidence (leases, shares, testimony of

lessees) and are therefore not barred as being the same cause of action earlier litigated.

With regards to the above it must be stressed that a cross-bill (Virginia still has separate rules for law and equity) is not mandatory in Virginia. Rule 2:13 of the Rules of the Supreme Court of Virginia states, "A defendant may (Petitioner's emphasis) file a cross-bill which seeks relief against the plaintiff." Therefore, Petitioner/Solem was not required to raise her current constitutional claim when she was a defendant in Carbaugh v. Solem, 225 Va. 310 supra., a case brought in equity against her.

As for Solem's second litigation in which she was initially a plaintiff, Kenley v. Solem, 237 Va. 202, supra., the case was a declaratory action, involving no Constitutional issues, and thus it too presents no claim preclusion bar to the instant case. Virginia law, as exemplified in Winborne v. Doyle, 190 Va. 867, 59 S.E. 2d 90(1950), on declaratory judgments and claim preclusion, is the same as presented in Restatement, Second, Judgments, §33c (1980), "..a declaratory action determines only what it actually decides and does not have a claim preclusive effect on other contentions that might have been advanced." Kenley v. Solem ultimately decided only the narrow issue that the selling of shares in a goat so as to provide persons with the milk constituted a sale in violation of the regulations.

It is thus clear that Petitioner/Solem's current Constitutional claim is not barred in federal court as it would not be barred in state court because the claim fits the definition of a different cause of action under Virginia law, and is thus not precluded under Virginia claim preclusion law, either in and of itself, or even if considered a claim which would have been joined in a previous proceeding.

Accordingly, since Virginia law is clear and not evolving with regards to its claim preclusion law, since all facts brought up by the Petitioner in this regard are undisputed and may be observed in the record, and since the decision

below is clearly in error and in conflict with past decisions of this Court, the Court may wish to consider summary reversal of the decision below affirming dismissal of Petitioner's claim on the basis of Migra.

II. The Pasteurized Milk Ordinance has Identical or Similar Counterparts in All 50 States, and Its Language Concerning Sales of Milk to the Final Consumer is Applied in a Conflicting Manner From State to State With Regards to Incidental, On-Farm Sales

On May 10, 1987 the Food and Drug Administration/Health and Human Services prohibited the interstate sale of unpasteurized milk for human consumption, 21 C.F.R. §1240.61. The practical result of this is that every state wishing to ship milk beyond its borders has adopted the Pasteurized Milk Ordinance, or a similar counterpart. (See App., p. 125)

Though all states have adopted some form of this same federal law, approximately 50% do not apply the prohibition contained therein that only Grade A pasteurized milk may be sold to the final consumer to prohibit intrastate sales of raw milk, as they have various other regulations in this regard that allow the sales. Twelve states have no regulation at all, or very little for incidental, on-farm sales, whether solicited or not; although most all incidental, on-farm sales are unsolicited. (See App., p.126 for information on raw milk states) Thus the application of the federal Pasteurized Milk Ordinance varies from state to state with respect to incidental, on-farm sales. (See App., p. 114-116,122-124 for correspondence which illustrates this point)

Of particular note is the State of Michigan which adopted the Pasteurized Milk Ordinance in 1966,(App., p.123) and is now applying it to prohibit incidental, on-farm sales in spite of the fact that People v. Powell, 280 Mich 699, 274

N.W. 372, 111 A.L.R. 721(1937) is controlling law in that state as to the licensing of incidental, on-farm sales of milk. That case held that such sales were not a sale to the "public" under the statute in force at that time, and that, "The statute was not intended to abridge the right to contract with a few neighbors for a strictly incidental purpose," or... "to be so construed as to compel every farmer who sells a pint of milk to his neighbor to take out a license and be placed under public regulation." People v. Powell, 280 Mich., at 73. (Joint App., Courter v. Solem, filed in Fourth Circuit, p 65-73) (See same App. for beginning arguments on this subject, p.113-114) Although the wording of the statute at that time is not the same as the Pasteurized Milk Ordinance, the adjudged principle of law endures.

In this regard the Michigan Supreme Court decision in People v. Powell, supra. is in conflict with the Virginia Supreme Court decision in Carbaugh v. Solem, 225 Va. supra. at 310, which states, "Such sales are commerce, and all such commerce, no matter how 'limited' or 'restricted', is unlawful. A single sale is both a civil violation and a criminal offense."

The fact that various states are applying the prohibitory language of the Pasteurized Milk Ordinance to prevent incidental, on-farm sales is of concern as such sales touch close to the heart of liberty under the Constitution's Due Process Clause. Since this ordinance is a federal law it should be applied in a manner which is both consistent and constitutional.

Under §14, Interpretation and enforcement, of Virginia's Regulations Governing Grade A Milk it states,

> "A. This regulation is based on the 'Grade A Pasteurized Milk Ordinance--1989 Recommendations.' Except as otherwise provided in this regulation, the provisions of this regulation shall be interpreted in a manner consistent with interpretations accorded the

'Grade A Pasteurized Milk Ordinance--1989 recommendations'." (App., p. 108)

The Introduction to the Pasteurized Milk Ordinance--1989 Recommendations states that its adoption is recommended, "to encourage a greater uniformity and a higher level of excellence of milk sanitation practice in the United States "...and, "to facilitate the shipment and acceptance of milk and milk products of high sanitary quality in interstate and intrastate commerce."

Whether this "purpose" is interpreted to cover incidental, on-farm sales under the circumstances outlined in Petitioner's complaint is not at all apparent in the ordinance itself; in fact definitions of "dairy farm", "milk producer", "consumer", etc., do not support such an interpretation of its purpose. (App., p. 23, 30, 22) It is hoped that the Supreme Court will grant this petition so that the merits of this case can be argued, not only on the above points, but others as well. The Pasteurized Milk Ordinance is used throughout this country, and its interpretation needs to be clarified by this Court so that it is not misused in an unconstitutional manner.

III. Incidental, On-Farm Sales Are Crucial to the Continued Existence of Small Farms Across the Country

The sum total of all incidental, on-farm sales of various farm products comprises a small diversified farm's profitability, and in fact the sales are interdependent with each other; yet no category of any such incidental sale is large enough to be "clothed with a public interest". As such, this case concerning goats' milk could just as well have been about meat, homemade cheese, or any other farm product sold in an analogous manner. This type of farm, once the backbone of our country, right now is struggling in America, as regulations

designed for commercial agribusiness enterprises are applied to it in an increasing number of states.

This application is paralleled by the growth of agribusiness in that particular state. While agribusiness serves an important function, small diversified farms also serve other equally important functions. Small farmers buy bags of feed at the co-op stores too, thus supporting the infrastructure of the whole agricultural community. Then too, these small farms provide persons who cannot afford the capital expenditure required to set up a commercial agribusiness operation the opportunity to make a living. When small farms fail, so does the overall rural economy and culture.

As agribusiness interests become more powerful in a state, greed and short-sightedness on their part exert a powerful influence on the wisdom and intent of a state legislature that can trample the rights of due process and contract of small domestic farms. This phenomena is illustrated by the attempts made in 1992-94 in the Virginia legislature to allow the unadvertised, on-farm sale of up to 100 gallons a month of ungraded raw goats' milk. (Joint App., Solem v. Courter. Fourth Circuit, p. 17, 97) Other conditions imposed on the sale were simple testing, warning labels, etc.; that is to say, reasonable regulations designed to balance the issues of health protection and freedom. The failed bill is in the Appendix, p. 117-118, Raw goats' milk is food, legal to possess and not illegal to buy. (Joint App., Solem v. Courter, p. 56) To postulate that it is so dangerous that it can not be sold under any circumstances when alcohol, tobacco, and hand guns can, is to insult the reasonable mind.

Throughout the history of this country, small people, denied basic Constitutional rights by the legislature, for whatever reason, have turned to the courts for relief. Petitioner is well aware that economic substance due process/liberty of contract claims have not been fashionable for a number of years, mainly failing the rational basis test. However, the manner in which this complaint is drawn calls

into question issues which call for strict scrutiny as well. Then too, regulations concerning the commercial milk industry have been uniformly upheld by the courts; but, never have they undergone a direct constitutional challenge with respect to unsolicited, incidental, on-farm sales. As such, this Petition presents a question of first impression.

The State power to enforce regulations for the health and welfare of its citizens is not debatable. But when such regulations become oppressive and cut too deeply into the fabric of individuals' lives, legitimate constitutional questions are brought into focus. The question of whether a state has the right to absolutely prohibit on-farm incidental sales is imperative for the Supreme Court to answer, not only before all the small farms are gone, but before the liberty to go to a small farm and buy food, a freedom taken for granted for many years, is gone too.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

No. 95-913 DEC 11 1995

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term 1995

CHRISTINE SOLEM,

Petitioner,

v.

J. CARLTON COURTER, III, Commissioner of Agriculture and Consumer Services,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner's Appendix

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130pp

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Christine Solem,
Plaintiff-Appellant,

v. No. 95-1108

J. Carlton Courter, III,
Commissioner of Agriculture and
Consumer Services,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.
B. Waugh Crigler, Magistrate Judge.
(CA-94-48)

Submitted: July 27, 1995
Decided: August 18, 1995
Entered: August 18, 1995

Before ERVIN, Chief Judge, MOTZ, Circuit Judge,
and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Christine Solem, Appellant Pro Se. John Barry Purcell, Jr.,
OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA,
Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Christine Solem appeals the magistrate judge's order dismissing her suit against the Virginia Department of Agriculture and Consumer Services.* This lawsuit is a continuation of Solem's effort to supply unpasteurized goats' milk to other people notwithstanding Va. Regs. Reg. 115-05-01, Regulations Governing Grade "A" Milk, which forbids the sale of such milk. Solem, a goat farmer, contends that the regulations requiring pasteurization are unconstitutional because they include incidental sales to consumers, and not just commercial operations. Finding no reversible error, we affirm the decision of the district court.

Solem is precluded from raising her Fourteenth Amendment due process claim in federal court. *See Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984). Solem has twice litigated pasteurization regulations in the Virginia Supreme Court, and twice the regulations have been upheld. *See Kenley v. Solem*, 375 S.E.2d 532 (Va. 1989); *Carbaugh v. Solem*, 302 S.E.2d 33 (Va. 1983). Solem could have raised her constitutional claims in her prior litigation, as state courts are always appropriate forums to raise the constitutionality of the application of a state statute or regulation. Because it is more important to give full faith and

*The parties consented to the jurisdiction of the magistrate judge pursuant to 28 U.S.C.A. § 636(c) (West 1993).

credit to state court judgments than ensure separate forums for federal and state claims, Solem is precluded from raising claims that she had ample opportunity to litigate in her state court proceedings. *Migra*, 465 U.S. at 84.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

CHARLOTTESVILLE DIVISION

CHRISTINE SOLEM, Plaintiff -vs- J. CARLTON COURTER, III, Commissioner of Agriculture and Consumer Services, Defendant	CASE NO.: 94-CV-48

DECEMBER 8, 1994

HEARD BEFORE:

THE HONORABLE B. WAUGH CRIGLER

The second thing is with regard to sale, to make that clear, contracts, I am sorry, to make that clear, I am referring to sales. A sale is a contract between two people.

THE COURT: Let me preliminarily state on the Record that this matter is before this Court under authority of 28 USC, Section 636(c), the parties having consented to the exercise of dispositive jurisdiction by this Court, and is immediately before the Court on the motion for summary judgment or motion to dismiss. Based on the virtually indisputable record that has been generated by both sides in this case, the Court feels that there really are no material issues with respect to the legal issues that need to be decided here, and that is raised by the Defendant, whether or not the Plaintiff's due process claim, constitutional claim, is barred or lacks substantiality, or is barred by res judicata, or, as a matter of law, should be dismissed because it just fails to state any protected due process right.

Now, what the Defendant essentially argues is that this is a matter of legislative determination, that the act is something that regulates the distribution of milk products, which is within the police power of the state, and they have the authority to ban, bar, or regulate, depending on how they see fit under the evidence as presented to the legislature, so long as they don't do it in a recognizable, discriminatory way, based on race, religion, national origin, or those matters.

MS. SOLEM: Could I say something?

THE COURT: I am announcing my decision, but I will let you say whatever you want to say. Go ahead.

MS. SOLEM: I think it is not just a question of material fact. It is also a question of inferences that can be drawn from that, and I think that - -

THE COURT: Rule 56 deals with that, and that hasn't escaped the Court, I promise you.

MS. SOLEM: Okay.

THE COURT: Now, this Court is not going to recite the history of these cases, because I think the history that may pertain to a decision in this case is certainly set forth by the Supreme Court in Carbaugh versus Solem, 225 VA 310, and Kinley versus Solem, and that is 237 VA 202. They are decisions by the Supreme Court of Virginia that, essentially, set forth the history of the litigation that Ms. Solem has been involved in, in an effort to distribute, in one form or another, goat milk.

MS. SOLEM: Is this material to the case, what has happened in the past? I don't think that it is, other than the question of whether the injunction still applies or the question of res judicata.

THE COURT: Can I ask a favor?

MS. SOLEM: I am sorry.

THE COURT: I am trying to announce a decision. I am doing the best I can under the circumstances, and I understand your situation. The only thing I have just stated is that the history of this case, if somebody is interested in knowing about it, is found in those cases.

MS. SOLEM: Oh, I am sorry.

THE COURT: That is all I just said, I hope. If I said anything more, I didn't mean to infer that that is necessarily important, but rather than having to recite all of that here, I just simply cite those cases in case somebody is interested.

Now, what is squarely before the Court is this: One, whether or not the Plaintiff is barred under principles of res judicata from even raising the constitutional issue. That is an issue that is before the Court, and it is the considered opinion of this court that the actual issues in those prior cases, to the extent that they are applicable, were not the same issues that were litigated in this case. So if you look at res judicata in its purest form, res judicata does not apply, but that raises the question of whether any form of res judicata applies, and that is why the Court called the parties' attention to the Miger decision, because that decision says this, simply: If the Plaintiff has litigated State Court cases, and if in those State Court cases the issues raised in the Federal proceedings could have been raised in the State proceedings in one form or another, than she is barred from raising them in Federal Court. That is what that case says. That is called issue preclusion.

Now this Court has done enough work in the area of issue preclusion because we do a considerable amount of State habeas and 1983 cases involving prisoners to know what can and can't be raised in State Court litigation. Whether it was or not, or whether it could be raised at a certain point in those cases is not the issue that the Court needs to determine. It is whether or not the constitutional claim that is being asserted here could have been asserted before the State Judges that heard these cases initially, and the obvious answer is yes, legally, they could have. Whether they were or not, whether the Counsel did it properly or it didn't do it properly, whether that was their concern at the time is not what this Court concerns itself with. It is whether those issues could have been raised. So, yes, they could have been raised. The State forum is always an appropriate forum to raise whether or not the application of the regulation or the statue is constitutional.

Now, it is my considered opinion that issue preclusion bars the Plaintiff from raising the issues here, but, even if she is not, I want to address even if you are not, because I think that is an important thing, what is this claim all about, and I do believe Ms. Solem articulated what her position is. She wants the court to determine the propriety of the application of the statue to her. I mean if anything she has said during this whole litigation is clear, it is that, and I appreciate that, because that is exactly what your position is in this case.

Now, what does she want the Court to do, and this is exactly what she wants the court to do, she wants the Court to construe the statue in a way that says it does not apply to her, plain and simple, because if it does not apply to her, where people come to her for this product under the circumstances that are set forth in her allegations and in, really, the indisputable record in this case as to why you want to do and what you want to do, she wants the Court to say that is okay, because if it is construed any other way, it is unconstitutional.

If that is not the position that she wants, she just says simply, "Judge, the Court should construe this as not being applicable to me."

Now, that has raised Mr. Purcell's argument on behalf of the Defendants because they, basically, take the position that all she is asking the Court to do is perform a State Court function of construing the applicability of the statue, Number One, and, Number Two, if I do anything else, then I am stepping on the wisdom of the legislature. I am making this a statue that the legislature did not make.

Now, I don't care how you say those things, that does raise whether or not a substantial Federal question has been raised, and if the only purpose of the litigation is to get the Court to construe the statute as applied, that is not a substantial Federal question. That is a State law question.

If there is an out and out challenge to the validity of the statute under the due process clause because of its application, that is another matter, and that gets us into the second

argument as to whether or not there is a rational basis for that application, and the law clearly is that a regulation is unconstitutional only if there are no grounds that can conceivably justify it, and this case is packed with grounds. Based on the history, everything that the parties have developed in this case, the legislature has, in its wisdom, or lack thereof, determined that distribution of milk under conditions, except as set forth by the regulations that it has permitted, is going to prohibited, and it has permitted the Agricultural and Consumer Services Board and the State Health Commissioner to establish those regulations.
It is an exercise of police power.

Now, I will tell you that personally I disagree with this case, with the decision by the State. If the Court's personal judgment controlled in this particular case, I would side with the Plaintiff, because I do believe there are benefits that should be recognized by the legislature; that they aren't though, is not a constitutional issue. It is simply a disagreement with legislative wisdom.

I wish that milk, goat milk could be distributed under those circumstances, personally, but the legislature has chosen not to allow that. I concede and would agree that this is not of the stature of marijuana or cocaine or guns or anything like that. It is different, and there are therapeutic effects that clearly no one, in my view, could refuse to recognize, but that doesn't mean they have to accept them as a sole basis for determining to grant or deny the right to sell this type of product, because it has been determined that the sale of any unpasteurized milk is not going to be allowed, and that is not an irrational decision in the legal sense, in the legal sense.

Now, in the 13 years I have been on the bench, there have been two cases where I thought the Government was absolutely wrong when it dealt with individuals. One was in the case of Drinkard versus the Secretary of Health and Human Services, where a man wanted to go out and buy a $1,000 chair to get himself around in, where the Secretary's

regulations required him to buy a $10,000 chair. I thought that was just downright foolish, and this is the other one.

I think it is foolish for the State not to allow her to do what she is doing, but that is not the test under the exercise of police powers. It is whether or not there is a rational basis for it, and if you look at the Supreme Court decisions, particularly the ones that have come out of the Supreme Court in the last two years, it is getting harder and harder to find anything irrational. If you read the decisions of the justices, some of the most foolish things are determined to be rational, and I think they would have been better off saying that where there are matters committed to the exercise of police power to the legislature and to the regulatory agencies, we are just not going to mess with it, but they don't want to quite say that because they like to mess with the ones they think are foolish beyond imagination.

Now, it is hard for me to make this decision because it is not one that I want to make.

MS. SOLEM: Can I ask a question?

THE COURT: I haven't finished, and I want you to understand that it is not one that I like to make, but I think their defensive position in this case is entirely correct, except to the extent that they rely on the full force of res judicata, which I don't believe applies in the basis they have, but I do believe that issue preclusion applies. I am going to dismiss this case, but I do so, I hope, having convinced you that I don't like to do what I am doing right now, but the law compels me to.

MS. SOLEM: Could I still ask a question?

THE COURT: Yes, ma'am.

MS. SOLEM: What about my argument about that it is unconstitutional as written?

THE COURT: You mean on its face? If that is what you are - - - I didn't hear you arguing that, but to the extent that you argued that, it is absolutely not unconstitutional on its face because I believe the law is that they could prohibit this altogether, as a valid exercise of police power based on the rational basis test, and this does not involve a suspect class. So, consequently, it is not viewed on a strict scrutiny basis. It is viewed on a rationality basis, and the law is legend in this regard, I believe, that supports - - - Now, there is some State decisions that don't support that, but the Federal law that I am aware of would support the ability of the State and the Commissioner to draw a statute and a regulation that actually prohibits the distribution of non-pasteurized milk of any form, and the statute includes goat's milk, or the regulation does.

MS. SOLEM: But what about the fact that you cannot buy it?

THE COURT: The answer to that is that you can't assert the rights of the purchasers. You can only assert the rights of the person producing it.

MS. SOLEM: That is exactly the point; they don't have access to the court.

THE COURT: Well, but you can't assert their rights because you don't have standing to assert the rights of the purchaser. You only have standing to assert the rights of the seller.

MS. SOLEM: How could they assert their rights?

THE COURT: That is not for me to determine in this case. They can go out and purchase it and be charged with a violation of it somehow, if that is even a charge.

MS. SOLEM: They can't ; they are not legal.

THE COURT: They can be charged with contributing to or accessory to or aider and abettor in.

MS. SOLEM: And, actually, I am a purchaser because I want to buy it at times.

THE COURT: Well, that is not part of this case.

MS. SOLEM: Can I object?

THE COURT: Here is what you do, just so she knows, Mr. Purcell, you can file an appeal. I am going to reduce this to writing, as far as the order is concerned, and if you want a transcript of this, you need to get a transcript from the Court Reporter who is right here today, and you have 30 days from the date that my order is entered to file an appeal to the Fourth Circuit Court of Appeals in Richmond, okay?

MS. SOLEM: Okay.

THE COURT: If they want to know, I am going to tell them right now, I hope I am wrong.

MS SOLEM: You probably aren't.

THE COURT: Personally, I don't like reaching the result I did, but I think it is one compelled by the law. So I hope you will get me reversed.

MS. SOLEM: I will try.

THE COURT: I am sure you will, Thank you. Nice to see you. Ms. Solem, thank you so much.

(Thereupon, the Proceedings were concluded.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CHRISTINE SOLEM,	)Civil Action No. 94-0048-C
Plaintiff,	)
v.	)ORDER
J. CARLTON COURTER, III)	
Commissioner of Agriculture	)By: B. WAUGH CRIGLER
and Consumer Services,	)U.S. MAGISTRATE JUDGE
Defendant,	)

Entered December 14, 1994

For the reasons set forth from the bench on December 8, 1994, it is

ORDERED

that defendant's motion to dismiss be, and same hereby is granted, and this action hereby is dismissed from the docket of the court.[1]

The clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: /s/ B. Waugh Crigler
Magistrate Judge
December 14, 1994

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR. CLERK
BY: /s/ Deputy Clerk

[1] To the extent the court considered evidence offered by both sides outside the pleadings of the case, the defendant's motion was treated by the court as on under Fed. R. Civ. P. 56.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ENTERED
September 25, 1995

No. 95-1108
CA-94-48

CHRISTINE SOLEM
Plaintiff - Appellant

v.

J. CARLTON COURTER, III, Commissioner of Agriculture and Consumer Services
Defendant - Appellee

- - - - - - - - - - - - - - - - -

On Petition for Rehearing with
Suggestion for Rehearing in Banc

- - - - - - - - - - - - - - - - -

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Bert M. Montague
CLERK

REGULATIONS GOVERNING GRADE "A" MILK (VR 115-05-01)

VIRGINIA DEPARTMENT
OF
AGRICULTURE
AND
CONSUMER SERVICES

DIVISION OF DAIRY AND FOODS
RICHMOND, VIRGINIA 23219

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
REGULATIONS GOVERNING GRADE "A" MILK
(VR 115-05-01)

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Statutory Authority: § 3.1-530.1 through § 3.1-530.9 of the Code of Virginia.

VIRGINIA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
REGULATIONS GOVERNING GRADE "A" MILK
(VR 115-05-01)

§ 1. Definitions and standards of identity.

The following words and terms, when used in this regulation, shall have the following meaning, unless the context clearly indicates otherwise:

"Acidified lowfat milk" means "acidified lowfat milk" as defined in 21 CFR §131.136.

"Acidified milk" means "acidified milk" as defined in 21 CFR §131.111.

"Acidified milk product" means a product with an acidity of not less than 0.50% expressed as lactic acid, which product is obtained by the addition of food grade acids to pasteurized: (i) cream; (ii) half-and-half; (iii) heavy cream; (iv) light cream; (v) lowfat milk; (vi) milk; (vii) skim milk; or (viii) sour cream.

"Acidified skim milk" means "acidified skim milk" as defined in 21 CFR §131.144.

"Acidified sour cream" means "acidified sour cream" as defined in 21 CFR §131.162.

"Acidified sour half-and-half" means "acidified sour half-and-half" as defined in 21 CFR §131.187.

"Adulterated milk or milk product" means any milk, milk product, condensed milk product, or dry milk product which meets one or more of the conditions specified in Section 402 of the Federal Food, Drug and Cosmetic Act, as amended (21 U.S.C. 342).

"Aseptically processed milk" means milk: (i) that is hermetically sealed in a container and so thermally processed before or after packaging in conformance with 21 CFR Part 113 and the provisions of this regulation so as to render the product free of microorganisms capable of reproducing in the product under non-refrigeration conditions of storage and distribution; and (ii) that is free of viable microorganisms (including spores) capable of causing disease in humans.

"Aseptically processed milk product" means any milk or milk product: (i) that is hermetically sealed in a container and so thermally processed before or after packaging in conformance with 21 CFR §113 and the provisions of this regulation so as to render the product free of microorganisms capable of reproducing in the product under normal non-refrigeration conditions of storage and distribution; and (ii) that is free of viable microorganisms (including spores) capable of causing disease in humans.

"Butterfat" means the fat of milk.

"Buttermilk" means the fluid milk product: (i) remaining after the manufacture of butter from milk or cream; and (ii) which contains not less than 8.25% of milk solids not fat.

"Cancel" means to permanently nullify, void, or delete a grade A permit issued by the State Regulatory Authority.

"CFR" means Code of Federal Regulations.

"Coffee cream" means "light cream."

"Concentrated milk" means "concentrated milk" as defined in 21 CFR §131.115.

"Concentrated milk product" means any of the following foods: homogenized concentrated milk; vitamin D concentrated milk; concentrated skim milk; fortified concentrated skim milk; concentrated lowfat milk; fortified concentrated lowfat milk; concentrated flavored milk; concentrated flavored milk product; or concentrated products made from concentrated milk or concentrated skim milk; which when combined with potable water according to the instructions printed on the food's container, conforms to the definition of the corresponding milk product in this regulation.

"Condensed and dry milk product" means any of the following: grade "A" condensed milk, grade "A" condensed and dry whey, grade "A" dry milk product, or grade "A" dry milk and whey product.

"Condensed milk" means milk unsterilized and unsweetened, resulting from the removal of a portion of water. This definition shall not be deemed to include:

(A) Any (i) sterilized milk or (ii) milk product, when the sterilized milk or milk product is hermetically sealed in a container and

processed, either before or after sealing, so as to prevent microbial spoilage; or

(B) Any (i) evaporated milk or (ii) sweetened condensed milk, except when the evaporated milk or sweetened condensed milk is combined with other substances in the commercial preparation of any pasteurized, ultra-pasteurized, or aseptically processed milk, or milk product.

"Condensed whey" means the product resulting from the removal of a portion of water from whey.

"Consumer" means any person who utilizes any grade "A" milk grade "A" milk product, or milk product.

"Cottage cheese" means "cottage cheese" as defined in 21 CFR §133.128.

"Cottage cheese dry curd" means "dry curd cottage cheese."

"Cream" means "cream" as defined in 21 CFR §131.3(a).

"Cultured half-and-half" means "sour half-and-half."

"Cultured milk" means "cultured milk" as defined in 21 CFR §131.112.

"Cultured lowfat milk" means "cultured lowfat milk" as defined in 21 CFR §131.138.

"Cultured skim milk" means "cultured skim milk" as defined in 21 CFR §131.146.

"Cultured sour cream" means "sour cream."

"Dairy farm" means any premises where any cow, goat, or sheep is kept, from which cow, goat, or sheep any milk or any milk product is provided, sold, or offered for sale to a milk plant, transfer station, or receiving station.

"Deny" means the State Regulatory Authority will not issue a grade A permit to the applicant.

"Drug" means: (i) articles recognized in the official United States Pharmacopeia, official Homeopathic Pharmacopeia of the United States, or official National Formulary, or any supplement to any of them; (ii) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; (iii) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (iv) articles intended for use as a component of any articles specified in (i), (ii), or (iii) of this definition, but does not include devices or their components, parts, or accessories.

"Dry cream" means "dry cream" as defined in 21 CFR §131.149.

"Dry curd cottage cheese" means "dry curd cottage cheese" as defined in 21 CFR §133.129.

"Dry milk product" means a product resulting from the drying of any milk or milk product and any product resulting from the combination of a dry milk product with other safe and suitable dry ingredients.

"Dry whey" means the product resulting from the drying of whey, while leaving all other constitutents in the same relative proportions as in whey.

"Dry whole milk" means "dry whole milk" as defined in 21 CFR §131.147.

"Eggnog" means "eggnog" as defined in 21 CFR §131.170.

"Eggnog-flavored milk" means a milk product (to which an emulsifier and a maximum of 0.5% stabilizer may have been added) consisting of a mixture of: (i) at least 3.25% butterfat, (ii) at least 0.5% egg yolk solids, (iii) sweetener, and (iv) flavoring.

"Evaporated milk" means "evaporated milk" as defined in 21 CFR §131.130.

"Evaporated skimmed milk" means "evaporated skimmed milk" as defined in 21 CFR §131.132.

"Flavored milk" means milk to which a flavor or sweetener has been added.

"Flavored milk product" means any milk product to which a flavor or sweetener has been added.

"Fortified milk" means milk (other than vitamin D milk), the vitamin or mineral content of which milk has been increased.

"Fortified milk product" means any milk product (other than a vitamin D milk product), the vitamin or mineral content of which milk product has been increased.

"Frozen milk concentrate" means the frozen milk product to which, when water is added in accordance with instructions on the package containing the frozen milk product, the reconstituted milk product contains the percent milkfat and the percent milk solids not fat of milk.

"Goat milk" means the normal lacteal secretion, practically free of colostrum, obtained by the complete milking of one or more healthy goats, which lacteal secretion, when sold in retail packages, contains not less than 2.5% milkfat and not less than 7.5% milk solids not fat.

"Grade A condensed and dry whey" means condensed or dry whey which complies with the provisions of the "Grade A Condensed and Dry Milk Products and Condensed and Dry Whey," Supplement I to the Grade A Pasteurized Milk Ordinance--1978 Recommendations" and this regulation.

"Grade A condensed milk" means condensed milk which complies with the provisions of the "Grade A Condensed and Dry Milk Products and Condensed and Dry Whey," Supplement I to the Grade A Pasteurized Milk Ordinance--1978 Recommendations" and this regulation.

"Grade A dry milk product" means any dry milk product which complies with the provisions of the "Grade A Condensed and Dry Milk Products and Condensed and Dry Whey," Supplement I to the Grade A Pasteurized Milk Ordinance--1978 Recommendations" and this regulation.

"Grade A dry milk and whey product" means any dry milk or whey product which: (i) has been produced for use in any grade A pasteurized, ultra-pasteurized, or aseptically processed milk product; and (ii) which has been manufactured under the provisions of the "Grade A Condensed and Dry Milk Products and Condensed and Dry Whey", Supplement I to the Grade A Pasteurized Milk Ordinance--1978 Recommendations"; and this regulation.

"Grade A permit" means the written document issued by the State Regulatory Authority to the person who operates a: (i) dairy farm to produce raw milk for pasteurization, ultrapasteurization, or aseptic processing; (ii) milk plant; (iii) receiving station; (iv) transfer station; (v) milk condensing plant; (vi) milk drying plant; (vii) whey condensing plant; or (viii) whey drying plant; after the State Regulatory Authority has inspected and approved the person's operation specified in (i) through (viii) of this definition, and determined the person's compliance with the provisions specified in this regulation for the operations specified in (i) through (viii) of this definition.

"Half-and-half" means "half-and-half" as defined in 21 CFR §131.180.

"Heavy cream" means "heavy cream" as defined in 21 CFR §131.150.

"Homogenized" means that: (i) milk or a milk product has been treated to ensure breakup of the fat globules in the milk or milk product to such an extent that, after 48 hours of undisturbed storage at 40°F, no visible cream separation occurs on the milk or milk product;

and (ii) the fat percentage of the top 100 milliliters of the milk or milk product in a quart, or of proportionate volumes in containers of other sizes, does not differ by more than 10% from the fat percentage of the remaining milk or milk product as determined after thorough mixing.

"Lactose-reduced lowfat milk" means the product resulting from the addition of safe and suitable enzymes to convert enough lactose to glucose or galactose so that less than 30% of the lactose remains in the lowfat milk from which the product is made.

"Lactose-reduced milk" means the product resulting from the addition of safe and suitable enzymes to convert enough lactose to glucose or galactose so that less than 30% of the lactose remains in the milk from which the product is made.

"Lactose-reduced skim milk" means the product resulting from the addition of safe and suitable enzymes to convert enough lactose to glucose or galactose so that less than 30% of the lactose remains in the skim milk from which the product is made.

"Light cream" means "light cream" as defined in 21 CFR §131.155.

"Light whipping cream" means "light whipping cream" as defined in 21 CFR §131.157.

"Lowfat cottage cheese" means "lowfat cottage cheese" as defined in 21 CFR §133.131.

"Lowfat dry milk" means "lowfat dry milk" as defined in 21 CFR §131.123.

"Lowfat milk" means "lowfat milk" as defined in 21 CFR §131.135.

"Lowfat yogurt" means "lowfat yogurt" as defined in 21 CFR §131.203.

"Low-sodium lowfat milk" means the milk product resulting from the treatment of lowfat milk by a process of passing the lowfat milk through an ion exchange resin process, or by any other process which has been recognized by the Food and Drug Administration that effectively reduces the sodium content of the product to less than 10 milligrams in 100 milliliters.

"Low-sodium milk" means the milk product resulting from the treatment of milk by a process of passing the milk through an ion exchange resin process, or by any other process which has been recognized by the Food and Drug Administration that effectively reduces the sodium content of the product to less than 10 milligrams in 100 milliliters.

"Low-sodium skim milk" means the milk product resulting from the treatment of skim milk by a process of passing the skim milk through an ion exchange resin process, or by any other process which has been recognized by the Food and Drug Administration that effectively reduces the sodium content of the product to less than 10 milligrams in 100 milliliters.

"Market milk" means milk.

"Market milk product" means milk product.

"Milk" means "milk" as defined in 21 CFR §131.110. Except as otherwise provided in this regulation, and except where the term "goat milk" is distinguished from "cow milk" in §3(L) and § 5(A)(3)(e) of this regulation, wherever the term "milk" is used, it shall be deemed to include "sheep milk" and "goat milk."

"Milk condensing plant" means any plant in which milk or any milk product is condensed or dried, or in which milk or any milk product is received, separated, or otherwise processed for drying and packaging.

"Milk drying plant" means any plant in which milk or any milk product is condensed or dried, or in which milk or any milk product is received, separated, or otherwise processed for drying and packaging.

"Milk distributor" means any person who offers for sale or sells to another person any milk or milk product.

"Milkfat" means the fat of milk.

"Milk hauler" means any person who transports any raw milk or raw milk product to or from a milk plant, a receiving station, or a transfer station.

"Milkhouse" means the building or room in which there is conducted on a grade A dairy farm: (i) the cooling, handling, and storing of milk; and (ii) the washing, sanitizing, and storing of milk containers and utensils.

"Milk plant" means any place, premises, or establishment where any milk or milk product is collected, handled, processed, stored, pasteurized,

ultra-pasteurized, aseptically processed, condensed, dried, bottled, or prepared for distribution.

"Milk producer" means any person who operates a dairy farm and who provides, sells, or offers milk for sale to a milk plant, receiving station, or transfer station.

"Milk product" means any of the following foods: (i) acidified lowfat milk, acidified milk, acidified milk product, acidified skim milk, acidified sour cream, acidified sour half-and-half, aseptically processed milk, aseptically processed milk product, buttermilk, coffee cream, concentrated milk, concentrated milk product, cottage cheese, cottage cheese dry curd, cream, cultured half-and-half, cultured milk, cultured lowfat milk, cultured skim milk, cultured sour cream, dry curd cottage cheese, eggnog, eggnog-flavored milk, flavored milk, flavored milk product, fortified milk, fortified milk product, frozen milk concentrate, goat milk, half-and-half, heavy cream, lactose-reduced lowfat milk, lactose-reduced milk, lactose-reduced skim milk, light cream, light whipping cream, lowfat cottage cheese, lowfat milk, lowfat yogurt, low-sodium lowfat milk, low-sodium milk, lowsodium skim milk, milk, nonfat milk, nonfat yogurt, recombined milk, recombined milk product, reconstituted milk, reconstituted milk product, sheep milk, skim milk, sour cream, sour half-and-half, table cream, vitamin D milk, vitamin D milk product, whipped cream, whipped light cream, whipping cream, or yogurt; (ii) any of the following foods: milk, lowfat milk, or skim milk with added safe and suitable microbial organisms; or (iii) any food made with a food specified in (i) of this definition by the addition or subtraction of milkfat or

addition of safe and suitable optional ingredients for protein, vitamin, or mineral fortification.

Nothing in this definition shall be deemed to include any evaporated milk, evaporated skim milk, condensed milk (sweetened or unsweetened), infant formula, ice cream or other dessert, dietary product, dry milk product (except as defined herein), canned eggnog in a rigid metal container, or butter or cheese, except when butter or cheese is combined with other substances to produce any pasteurized or aseptically processed food as specified in (i), (ii), or (iii) of this definition.

"Misbranded milk or milk product" means any milk, milk product, or condensed and dry milk product that: (i) satisfies any of the conditions specified in §403 of the Federal Food Drug, and Cosmetic Act, as amended (21 U.S.C. 343), (ii) does not conform to its definition; or (iii) is not labeled in accordance with §4 of this regulation.

"Nonfat dry milk" means "nonfat dry milk" as defined in 21 CFR §131.125.

"Nonfat dry milk fortified with vitamins A and D" means "nonfat dry milk fortified with vitamins A and D" as defined in 21 CFR §131.127.

"Nonfat milk" means "skim milk" as defined in 21 CFR §131.143.

"Nonfat yogurt" means "nonfat yogurt" as defined in 21 CFR §131.206.

"Normal storage" means storage at a temperature of 45°F. or cooler, but shall not be deemed to include freezing.

"Official laboratory" means a biological, chemical, or physical laboratory which is operated by the Commonwealth of Virginia.

"Officially designated laboratory" means: (i) a commercial laboratory authorized by the State Regulatory Authority to examine for the State Regulatory Authority any milk, milk product, or condensed and dry milk product; or (ii) a milk industry laboratory authorized by the State Regulatory Authority to examine: (a) milk producer samples of raw milk for pasteurization, and (b) for drug residues and bacterial limits, samples of raw milk commingled in a tank truck.[1]

"Optional ingredient" means: (i) only an ingredient specified as an optional ingredient in the definition of a milk product; or (ii) in the case in which no optional ingredient is specified pursuant to (i) of this definition, grade A condensed milk, grade A dry milk product, grade A condensed whey, grade A dry whey, concentrated milk, concentrated milk product, flavor, sweetener, stabilizer, emulsifier, acidifier, vitamin, mineral, or other safe and suitable ingredient.

"Pasteurization" or "pasteurized" means the process of heating every particle of milk, milk product, or whey in equipment designed and operated in conformance with this regulation, to one of the temperatures given in the following table and held continuously at or above that temperature for at least the corresponding specified time:

Temperature	Time
145°F.*	30 minutes
161°F.*	15 seconds
191°F.	1 second
194°F.	0.5 second
201°F.	0.1 second
204°F	0.05 second
212°F	0.01 second

*If: (i) the fat content of the milk or milk product is 10 percent or more, (ii) the milk or milk product contains added sweeteners, (iii) the product is condensed milk, or (iv) the milk product is a condensed milk product, then "pasteurization" means increasing the specified temperature by 5°F. If the milk product is eggnog, then "pasteurization" means heating to at least the following temperatures for the corresponding time specifications:

Temperature	Time
155°F.	30 minutes
175°F.	25 seconds
180°F.	15 seconds

Nothing in this definition shall be construed as barring any other process which has been recognized by the Food and Drug Administration as being equally efficacious as pasteurization, so long as that other process has been approved by the State Regulatory Authority.

"Person" means any individual, plant operator, partnership, corporation, company, firm, trustee, or institution.

"Public" means any person in the Commonwealth.

"Pull date" means the date affixed to a consumer package or container of grade "A" pasteurized milk or grade "A" pasteurized milk product which is the date after the day of manufacturing and processing of the package or container and the last day on which the grade "A" pasteurized milk or grade "A" pasteurized milk product as determined by the milk plant may be offered for sale to consumers under normal storage.

"Raw milk" means: (i) any milk or any milk product which has not been pasteurized, ultra-pasteurized, or aseptically processed; or (ii) any milk or any milk product which has been pasteurized, ultra-pasteurized, or aseptically processed, and which has been exposed to microbiological contamination before, during, or after packaging.

"Receiving station" means any place, premises, or establishment where raw milk is: (i) received, collected, handled, stored, or cooled; and (ii) prepared for further transporting.

"Recombined milk" means the food which when combined with potable water according to the instructions printed on the food's container, conforms to the milk fat and milk solids not fat requirements for milk, as specified in the definition of "milk."

"Recombined milk product" means the food which when combined with potable water according to the instructions printed on the food's container, conforms to the milk fat and milk solids not fat requirements for the milk product designated on the food's container.

"Reconstituted milk" means "recombined milk."

"Reconstituted milk product" means "recombined milk product."

"Revoke" means to permanently annul, repeal, rescind, countermand, or abrogate a grade A permit issued by the State Regulatory Authority.

"Safe and suitable" means "safe and suitable" as defined in 21 CFR §130.3(d).

"Sanitization" means the application of any effective method or substance to a clean surface for the destruction of pathogens, and of other organisms as far as is practicable, which method or substance, when used does not adversely affect: (i) the equipment which comes in contact with milk, milk product, or condensed and dry milk product; (ii) the milk, milk product, or condensed and dry milk product; or (iii) the health of consumers.

"Septage" means material accumulated in a pretreatment system or privy.

"Sewage" means water carried and non water carried human excrement, kitchen, laundry, shower, bath, or lavatory wastes separately or together with such underground, surface, storm and other water and liquid industrial wastes as may be present from residences, buildings, vehicles, industrial establishments or other places.

"Sheep milk" means the normal lacteal secretion, practically free of colostrum, obtained by the complete milking of one or more healthy sheep.

"Skim milk" means "skim milk" as defined in 21 CFR §131.143.

"Sour cream" means "sour cream" as defined in 21 CFR §131.160.

"Sour half-and-half" means "sour half-and-half" as defined in 21 CFR §131.185.

"State Regulatory Authority" means the Commissioner of Agriculture and Consumer Services or his agent when carrying out any duty specified in §3.1-530.3 of the Code of Virginia (1950), as amended, or the State Health Commissioner or his agent when carrying out any duty specified in §3.1-530.4 of the Code of Virginia (1950), as amended.

"Suspend" means to temporarily nullify, void, debar, or cease for a period of time, a grade A permit issued by the State Regulatory Authority.

"Sweetened condensed milk" means "sweetened condensed milk" as defined in 21 CFR §131.120.

"Sweetened condensed skimmed milk" means "sweetened condensed skimmed milk" as defined in 21 CFR §131.122.

"Table cream" means "light cream" as defined in 21 CFR §131.155.

"Transfer station" means any place, premises, or establishment where milk or milk products are transferred directly from one transport tank to another.

"Trim" means to shorten the hair on the udder and tail of milking cows and goats by clipping, singeing, cutting, or other means.

"Ultra-pasteurized" means, when used to describe any milk or milk product that the milk or milk product has been thermally processed at a temperature of 280°F. (138°C.) or hotter for at least two seconds, either before or after packaging, so as to produce a product that has an extended shelf life under normal storage.

"Vitamin A milk" means milk, the vitamin A content of which has been increased to at least 2000 International Units per quart.

"Vitamin A milk product" means a milk product, the vitamin A content of which has been increased to at least 2000 International Units per quart.

"Vitamin D milk" means milk, the vitamin D content of which has been increased to at least 400 International Units per quart.

"Vitamin D milk product" means a milk product, the vitamin D content of which has been increased to at least 400 International Units per quart.

"Whey" means the liquid substance obtained by separating the coagulum from milk, cream, or skim milk during the cheese making procedure and may have the acidity adjusted by the addition of safe and suitable ph-adjusting ingredients prior to pasteurization.

"Whey condensing plant" means a plant in which whey is condensed or in which whey is received and processed for drying and packaging.

"Whey drying plant" means a plant in which whey is dried, or in which whey is received and processed for drying and packaging.

"Whipped cream" means "heavy cream" as defined in 21 CFR §131.150 or "light whipping cream" as defined in 21 CFR §131.157, into which air or gas has been incorporated.

"Whipped light cream" means "light whipped cream" as defined in 21 CFR §131.155, into which air or gas has been incorporated.

"Whipping cream" means "light whipping cream" as defined in 21 CFR §131.157.

"Yogurt" means "yogurt" as defined in 21 CFR §131.200.

§ 2. Adulterated or misbranded milk or milk products.

A. No person may produce, provide, sell, offer, expose for sale, or possess, any adulterated milk or milk product, or any misbranded milk or milk product: (i) condensed and dry milk product; (ii) milk; or (iii) milk product.

B. Any person who produces, provides, sells, offers, exposes for sale, or possesses, any adulterated or misbranded: (i) condensed and dry milk

product; (ii) milk; or (iii) milk product; shall be subject to having the person's adulterated or misbranded condensed and dry milk product, milk, or milk product impounded by the State Regulatory Authority.

C. No person may provide, sell, offer, or expose for sale, any: (i) condensed and dry milk product; (ii) milk; or (iii) milk product; to any milk plant for use in any grade A milk or grade A milk product if the person does not possess a permit from the State Regulatory Authority, unless the Commissioner of Agriculture and Consumer Services makes a finding in writing (which the Commissioner of Agriculture and Consumer Services may renew for terms not to exceed 90 days per term, without limitation) that: (i) the supply of grade A raw milk for pasteurization, ultra-pasteurization, or aseptic processing is not adequate to meet the nutritional needs of any person who secures milk in the Commonwealth; or (ii) the supply of pasteurized, ultra-pasteurized, or aseptically processed milk or milk product at retail is not available for purchase by any person who secures milk in the Commonwealth.

D. No person may produce, provide, sell, offer, expose for sale, or possess any: (i) condensed and dry milk product; (ii) milk; or (iii) milk product; under the

provision of §2(C) unless the milk or milk product is labeled "ungraded."

§ 3. Permits.

A. No person may produce in, provide in, manufacture in, sell in, offer for sale in, store in, bring into, send into, or receive into, the Commonwealth any milk, milk product, or condensed and dry milk product for use in the commercial preparation of grade A pasteurized, ultra-pasteurized, or aseptically processed milk or milk product unless the person possesses a grade A permit from the State Regulatory Authority. Nothing in this regulation shall apply to any establishment where milk or milk product is served or sold at retail, so long as the milk or milk product is not processed at the establishment. Nothing in this regulation shall be deemed to require a person who is a broker, agent, or distributors' representative to have a grade A permit if the person buys condensed and dry milk product for, or sells condensed and dry milk product to, a milk plant that has a valid grade A permit from any state.

B. The State Regulatory Authority may cancel, suspend, or revoke the grade A permit of any person, or may deny to any person a grade A permit if:

1. The grade A permit holder fails to engage daily in the business for which the grade A permit is issued;

2. The grade A permit holder does not daily produce in, provide in, manufacture in, sell in, offer for sale in, store in, bring into, send into, or receive into, the Commonwealth

milk, milk product, or condensed and dry milk product;

3. The grade A permit holder fails to provide at no cost to the State Regulatory Authority samples of milk, milk product, or condensed and dry milk product in the person's possession for testing by the State Regulatory Authority;

4. The grade A permit holder fails to provide on a daily basis milk, milk product, or condensed and dry milk product in the person's possession for sampling and testing by the State Regulatory Authority;

5. The grade A permit holder fails to comply with any requirement of this regulation, or of §§3.1-530.1 through 3.1-530.9, 3.1-420 through 3.1-424, or 3.1-531 through 3.1-545 of the Code of Virginia (1950), as amended.

6. A public health hazard exists that affects the grade A permit holder's milk, milk product, or condensed and dry milk product;

7. The grade A permit holder or any agent of the grade A permit holder has obstructed or interfered with the State Regulatory Authority in the performance of the State Regulatory Authority's duties.

8. The person supplies false or misleading information to the State Regulatory Authority: (i) in the person's application for a grade A permit, (ii) concerning the identity of the

person who will control the facility that is the subject of the grade A permit, (iii) concerning the amount of milk, milk product, or condensed and dry milk product which the person produces in, provides in, manufactures in, sells in, offers for sale in, stores in, brings into, sends into, or receives into, the Commonwealth and the distribution of the person's milk, milk product, or condensed and dry milk product; (iv) concerning any investigation conducted by the State Regulatory Authority; or (v) concerning the location of any part of the person's operation that is subject to a grade A permit;

9. The grade A permit holder engages in fraudulent activity regarding: (i) the amount of milk, milk product, or condensed and dry milk product the person offers to sell or sells; or (ii) the collection of samples of the person's milk, milk product, or condensed and dry milk product used to determine compliance with any provision of this regulation or as a basis for payment for milk, milk product, or condensed and dry milk product;

10. Three of the most recent five bacteria counts, somatic cell counts, or cooling temperature determinations conducted on the grade A permit holder's raw milk exceed the standards specified in this regulation;

11. Three of the most recent five bacteria counts, coliform determinations, or cooling temperature determinations conducted on the grade A permit holder's milk, milk product, or

condensed and dry milk product exceed the standards specified in this regulation;

12. Two of the most recent cryoscope tests on the grade A permit holder's milk violate the standard specified in this regulation and the most recent violative sample occurred within two years of the next most recent violative sample;

13. The most recent drug residue test on the grade A permit holder's milk violates the standards specified in this regulation. In the event the State Regulatory Authority suspends the grade A permit the suspension shall be: (i) for a minimum of two days (except as specified in §3(B)(13)(b)); (ii) for a minimum of four days (except as specified in §3(B)(13)(b)) on the second occurrence of violative drug residues in the grade A permit holder's milk within a 12 month period after the grade A permit holder's first positive test for violative drug residues; or (iii) for a minimum of four days (except as specified in §3(B)(13)(b)) on the third occurrence of violative drug residues in the grade A permit holder's milk within a 12 month period after the grade A permit holder's first positive test for violative drug residues and the grade A permit holder's permit shall be subject to revocation; and (iv) the grade A permit holder whose milk test positive for violative drug residues shall provide and complete for each separate violation, the "Milk and Dairy Beef Residue Prevention Protocol", [2] and have a signed quality assurance certificate, displayed in the grade A permit holder's

milkhouse, within 30 days after the date of suspension of the grade A permit holder's permit;

a. The number of days represented by the grade A permit holder's milk shipment which tests positive for violative drug residues shall be determined by the State Regulatory Authority using the following factors: (i) the number of milkings included in the grade A permit holder's milk shipment which tests positive for violative drug residues; and (ii) the number of times each day the grade A permit holder milks; and

b. The number of days determined by the State Regulatory Authority shall satisfy the same portion of the grade A permit holder's required suspension period as the grade A permit holder's milk shipment represents;

14. The most recent phosphatase test on the grade A permit holder's milk, milk product, or condensed and dry milk product violates the standard specified in this regulation;

15. The most recent chemical residue test or pesticide residue test on the grade A permit holder's milk, milk product, or condensed and dry milk product exceeds the actionable level, tolerance level, or safe level for any chemical residue or pesticide residue specified in: (i) 40 CFR Parts 180, 185, or 186; and (ii) 21 CFR

Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 564, 570, 573, 589. In the event that no actionable level, tolerance level, or safe level for a chemical residue or pesticides residue has been established in: (i) 40 CFR Parts 180, 185, or 186; and (ii) 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 564, 570, 573, 589, the tolerance level shall be deemed to be zero.

16. The grade A permit holder fails to correct any deficiency that the State Regulatory Authority has cited, in a written notice of intent to suspend the person's grade A permit, as a violation of this regulation;

17. The grade A permit holder's raw milk for pasteurization is warmer than 50°F two hours after the completion of the first milking or the grade A permit holder's raw milk for pasteurization is warmer than 50°F during or after any subsequent milking;

18. The grade A permit holder's equipment is covered or partially covered by an accumulation of milk solids, milk fat, or other residue so that the milk, milk product, or condensed and dry milk product is adulterated;

19. The grade A permit holder sells or offers for sale milk, milk products, or condensed and dry milk product which violate any requirement of this regulation;

20. The grade A permit holder fails to complete the "Milk and Dairy Beef Residue Prevention Protocol,"[2] and have a signed quality assurance certificate, for display in the grade A permit holder's milkhouse, within 30 days after the date of the suspension of the grade A permit holder's permit because of the grade A permit holder's violation of §3(B)(13) of this regulation;

21. The authority in another state responsible for issuing grade A permits has denied, suspended, or revoked the permit of the person in that state for any act or omission that would violate this regulation or the statutes under which this regulation was adopted, had the act or omission occurred in the Commonwealth.

C. The State Regulatory Authority may summarily suspend a grade A permit for violation of any of the following provisions of this regulation: §§3(B)(6), 3(B)(9), 3(B)(10), 3(B)(11), 3(B)(12), 3(B)(13), 3(B)(14), 3(B)(15), 3(B)(16), 3(B)(17), 3(B)(18), 3(B)(19), or 3(B)(20).

D. No grade A permit holder may transfer any grade A permit to another person or another location.

E. Each grade A permit holder operating a milk plant within the Commonwealth shall provide to the State Regulatory Authority laboratory determinations of the quantity of vitamin A and vitamin D present in the milk plant's milk, milk product, fortified milk, and fortified milk product to which vitamin A or vitamin D has been added. Each grade A permit holder who

operates a milk plant shall provide these laboratory determinations at least annually from a laboratory utilizing "Determination of Vitamin D2 and Vitamin D3 in Foods, Feeds, and Pharmaceuticals, using High Performance Liquid Chromatography: Comparison of Three Different Columns*"[3] or "HPLC Assays for Vitamin A and E (HPLC Method 1)[4] as appropriate for vitamin A and vitamin D determination, or any other method approved for such testing by the Food and Drug Administration. Each grade A permit holder who operates a milk plant shall pay for the cost of the laboratory determinations.

F. Inspection of dairy farms, milk plants, condensing plants, and drying plants.

1. No person who operates a dairy farm, milk plant, receiving station, transfer station, condensing plant, or drying plant within the Commonwealth may hold a grade A permit until the dairy farm, milk plant, receiving station, transfer station, condensing plant, or drying plant has been inspected and approved by the State Regulatory Authority;

2. The State Regulatory Authority shall inspect at least once every three months each dairy farm that holds a grade A permit;

3. The State Regulatory Authority shall inspect at least every month each milk plant, transfer station, and receiving station that holds a grade A permit;

4. The State Regulatory Authority shall inspect at least once every three months each

condensing plant or drying plant that holds a grade A permit;

G. The examination of milk and milk products.

1. The State Regulatory Authority shall collect during any consecutive six months at least four samples of raw milk, collected in separate months, for pasteurization, ultra-pasteurization, or aseptic processing from each dairy farm that holds a grade A permit.

2. After receipt of the milk by the milk plant and prior to pasteurization, ultra-pasteurization or aseptic processing the State Regulatory Authority shall collect during any consecutive six months at least four samples of raw milk, collected in separate months, for pasteurization, ultra-pasteurization, or aseptic processing from each milk plant that holds a grade A permit.

3. The State Regulatory Authority shall collect four samples of each pasteurized, ultra-pasteurized, or aseptically processed milk product, each sample to be collected in separate months during any consecutive six month period, from each milk plant holding a grade A permit the Production

4. The State Regulatory Authority shall, except when the production is not on a yearly basis, during each month collect from each milk condensing plant, milk drying plant, whey condensing plant or whey drying plant holding a grade A permit at least one sample of raw

milk for pasteurization, after receipt of the milk by the plant and before pasteurization, and at least one sample of each grade A condensed milk product, grade A dry milk product, grade A condensed whey, and grade A dry whey manufactured. If the production of grade A dry milk products or grade A dry whey is not on a yearly basis, the State Regulatory Authority shall collect at least five samples within a continuous production period.

5. The State Regulatory Authority shall collect at least once every three months samples of milk and milk product from retail establishments selling milk or milk product to determine compliance with §§ 2,4,5, and 8 of this regulation. The person who operates the retail establishment shall furnish the State Regulatory Authority, upon the request of the State Regulatory Authority, with the names of all distributors from whom the person has obtained milk or milk product.

6. The State Regulatory Authority shall provide the remaining portion of the original raw milk sample from each grade A dairy farm which has been screened positive for animal drug residues by a milk plant, receiving station, or transfer station to the grade A dairy farms' milk marketing organization upon request.

H. Drug residue monitoring and farm surveillance.

1. Any grade A permit holder operating a milk plant, receiving station, or transfer station shall:

a. Prior to processing any raw milk from bulk tanks on farms, test for residues of beta lactam drugs all raw milk that the milk plant, receiving station, or transfer station receives for pasteurization, ultrapasteurization, or aseptic processing;

b. Test each shipment of bulk tank raw milk received for pasteurization, ultrapasteurization, or aseptic processing by screening tests methods which have been evaluated by Virginia Polytechnic Institute and State University in the study "Evaluation of Animal Drug Residue Detection Methods"[5] and which have been demonstrated by "Evaluation of Animal Drug Residue Detection Methods" to provide positive results for residues of beta lactam drugs, unless Association of Official Analytical Chemists(AOAC)-reviewed and Food and Drug Administration- (FDA)-accepted methods are available. In lieu of any test specified in §3(H)(l)(b) a grade A permit holder may use AOAC first-action and AOAC final-action tests methods. Nothing in §3(H)(l)(b) shall be deemed to include individual raw milk samples collected from each grade A dairy farm included in any shipment of bulk tank raw milk for pasteurization, ultra-pasteurization, or aseptic processing;

c. Implement a random-sampling program when the Commissioner of the Food and Drug Administration determines that a potential problem exists with animal drug residues or other contaminants in the milk supply. Any grade A permit holder operating a milk plant, receiving station, or transfer station shall analyze the samples for the contaminant by a method determined by FDA to be effective in determining compliance with actionable levels or established tolerances. Any grade A permit holder operating a milk plant, receiving station, or transfer station shall continue the random-sampling program until such time that the Commissioner of the Food and Drug Administration is reasonably assured that the problem has been corrected. The random sampling program shall represent and include during any consecutive six months, at least four samples collected in at least four separate months.

d. Retain any sample found to be positive for drug residues for a period of 120 hours after the sample test result is positive for drug residues for the use of the State Regulatory Authority;

e. Abstain from selling or offering for sale any pasteurized, ultra-pasteurized, or aseptically processed milk, milk product, or condensed and

dry milk product processed from raw milk for pasteurization, ultra-pasteurization, or aseptic processing before results of drug screening tests are available and which raw milk later tests positive for drug residues. All of the grade A permit holder's milk commingled with any raw milk which tests positive for drug residues shall be deemed adulterated. Any grade A permit holder operating a milk plant, receiving station, or transfer station shall report to the State Regulatory Authority instances of adulteration immediately;

f. (i) Record the results of tests on samples of raw milk and retain such records for a period of six months; (ii) report records of all results of tests on samples of raw milk to the State Regulatory Authority by the fifteenth day of each month for the preceding month; and (iii) maintain and make available to the State Regulatory Authority for inspection and review at the permitted facility records of results of tests on samples of raw milk. Any record of results of tests on samples of raw milk required by this §3(H)(l)(f) shall include:

1. The date and time of and place where the test was performed;

2. The registration identification of each pickup tanker of bulk raw milk or raw milk sampled;

3. The test method used;

4. A statement as to whether the test results were positive or negative. If the results were positive, the grade A permit holder shall also record:

a. The identity of each producer contributing to the load from which the positive sample of raw milk was taken;

b. The name of the person notified at the State Regulatory Authority of the positive test results;

c. The date and time of day the person at the State Regulatory Authority was notified of the positive test results; and

d. The method of notification of the State Regulatory Authority;

g. Immediately notify the State Regulatory Authority of any shipment of bulk tank raw milk for pasteurization, ultra-pasteurization, or aseptic processing when the shipment of bulk

tank raw milk is found to be positive for drug residues. Nothing in §3(H)(l)(g) shall be deemed to include individual raw milk samples collected from each grade A dairy farm included in any shipment of bulk tank raw milk for pasteurization, ultra-pasteurization, or aseptic processing;

h. Test each producer sample of raw milk to determine the farm of origin represented by any sample of raw milk which tests positive for drug residues and immediately report to the State Regulatory Authority the result of each producer sample representing the raw milk for pasteurization, ultra-pasteurization, or aseptic processing found to be positive for drug residues;

i. Immediately discontinue receiving shipments of raw milk from the grade A permit holder whose milk tests positive for drug residues, until subsequent tests by the State Regulatory Authority are no longer positive for drug residues and the producer has satisfied the requirements of §3(B)(13);

2. Any grade A permit holder whose milk tests positive for drug residues shall dispose of such milk in a manner that removes it from the human food chain or in any manner approved by the Food and Drug Administration;

I. Any grade A permit holder who operates a milk plant, receiving station, or transfer station, and any person who distributes milk or milk products shall furnish the State Regulatory Authority, upon request:

1. A true statement of the quantities of milk and milk products of each grade purchased or sold by the milk plant, receiving station, transfer station, or distributor of milk or milk product; and

2. A list of all sources from which the milk plant, receiving station, transfer station, or distributor of milk or milk product, received milk or milk product;

J. No person holding a grade A permit may operate a dairy farm that receives on the dairy farm raw or untreated sewage or septage from any septic tank, from any private or public sewage system, from any septic tank pump operator, from any hauler of septic tank waste or sewage, or from any other source;

K. No person who holds a grade A permit may place or hold in his milk storage tank: (i) any milk except that milk which was obtained from cows, sheep, or goats milked at the grade A permit holder's dairy farm; (ii) any milk which did not enter the milk storage tank through the milking and milk-handling equipment on the grade A permit holder's dairy farm during the milking of the grade A permit holder's cows, sheep, or goats; (iii) any milk which has been held without refrigeration; or (iv) any milk which has been exposed to chemical or physical contamination; and

L. No person may produce in, provide in, manufacture in, sell in, offer for sale in, store in, bring into, send into, or receive into, the Commonwealth any milk, milk product, or condensed and dry milk product for use in the commercial preparation of grade A pasteurized, ultra-pasteurized, or aseptically processed milk or milk products, any part of which is a combination of goat milk and cow milk, sheep milk and cow milk, or goat milk and sheep milk.

§ 4. Labeling.

A. No person may produce in, provide in, manufacture in, sell in, offer for sale in, store in, bring into, send into, or receive into, the Commonwealth any milk, milk product, or condensed and dry milk product for use in the commercial preparation of grade A pasteurized, ultra-pasteurized, or aseptically processed milk or milk products which are not labeled in compliance with the following:

1. Except for nutrition labeling, the grade A permit holder's bottles, containers, and packages enclosing any milk or milk products shall be labeled in accordance with the requirements of the Federal Food, Drug and Cosmetic Act, as amended, the Fair Packaging and Labeling Act, and regulations developed thereunder;

2. The grade A permit holder shall label or mark all bottles, containers, and packages enclosing any milk or milk products with:

a. The name of a defined milk product, if there is a definition, and if there is no

definition, a name that is not false or misleading;

b. The word "reconstituted" or "recombined" if the milk product is made by reconstitution or recombination;

c. The term "grade A";

d. The identity of the plant where the grade A permit holder's milk or milk product is pasteurized, ultra-pasteurized, or aseptically processed by specifying:

1. The street address, city, state, and zip code of the plant; or

2. The code assigned the plant under the National Uniform Coding System for Packaging Identification of Milk and Milk Product Processing Plants.[6]

e. In the case of concentrated milk, concentrated or concentrated milk products the volume or proportion of water to be added for recombining;

f. The name of the milk product that the concentrated milk product will produce, which name shall be preceded by the term "concentrated." In the case of flavored milk or flavored reconstituted milk, the grade A permit holder shall substitute the name of the principal flavor for the word "flavored";

g. In the case of aseptically processed milk and milk products the words "keep refrigerated after opening;"

h. In the case of aseptically processed and packaged milk or milk products, the term "UHT" ultra-high-temperature;

i. The term "ultra-pasteurized" if the milk or milk product has been ultra-pasteurized;

j. The term "goat" preceding the name of the milk or milk product when the milk or milk product is goat milk or is made from goat milk;

k. The term "sheep" preceding the name of the milk or milk product when the milk or milk product is sheep milk or is made from sheep milk;

1. The information appearing on the label of any bottle, container, or package of milk or milk product shall contain no marks, pictures, graphics, or words which are misleading;

m. The "pull date" which: (i) shall not interfere with the legibility of other labeling required for the milk or milk product; and (ii) shall be expressed by: (i) the first three letters in the name of the month, followed by or preceded by the numeral or numerals constituting the calendar date after which the product shall not be sold; or (ii) expressed numerically by the number of the month followed by the number of the day. For example, June 1 shall be expressed "JUN 1", "1 JUN", "06 01", or "06-01"; Nothing in this

regulation pertaining to pull dates shall apply to grade A pasteurized milk and grade A pasteurized milk products bottled in glass containers for home delivery;

n. The grade A permit holder who operates a milk plant and offers for sale milk or milk product within the Commonwealth shall file and certify with the State Regulatory Authority the maximum number of days after manufacturing or processing the grade A permit holder's milk or milk products which will be used to determine the "pull date". The grade A permit holder shall establish a "pull date" that under normal storage the milk or milk product meets for a minimum of 96 hours after the "pull date," standards set by this regulation;

o. No person may sell or offer for sale any grade A pasteurized milk, grade A pasteurized milk product, or milk product in a package that does not bear the "pull date;" and

p. Nothing in this regulation shall apply to containers of grade A pasteurized milk, grade A milk products, or milk products which are not to be sold in the Commonwealth.

§ 5. Standards for milk and milk products.

A. No person may produce in, provide in, manufacture in, sell in, offer for sale in, store in, bring into, send into, or receive into, the Commonwealth any milk, milk product, or condensed and dry milk product for use in the commercial preparation of grade A pasteurized,

ultrapasteurized, or aseptically processed milk or milk products which do not comply with the following:

1. Grade A raw milk for pasteurization or ultrapasteurization or aseptic processing and all grade A pasteurized, ultra-pasteurized, or aseptically processed milk or milk products shall be produced, processed, and pasteurized or ultra-pasteurized, or aseptically processed to conform with the following chemical, bacteriological, somatic cell, cryoscope, and temperature standards, and with the requirements of this regulation;

2. No process or manipulation other than: (i) pasteurization; (ii) ultra-pasteurization; (iii) aseptic processing; or (iv) processing methods integral with pasteurization, ultra-pasteurization, or aseptic processing; and refrigeration may be applied to milk or milk products for the purpose of removing or deactivating microorganisms. Nothing in this regulation is deemed to prohibit any grade A permit holder who operates a milk plant from preparing bulk shipments of cream, skim milk, or lowfat milk labeled as "heat treated"; if the raw milk, raw cream, skim milk, or lowfat milk is heated, one time, to a temperature warmer than 125°F. but cooler than 161°F. for separation purposes;

3. Grade A raw milk for pasteurization, ultrapasteurization, or aseptic processing shall comply with the following standards:

a. Temperature standard: Raw milk shall be cooled to 40°F. or cooler, but not frozen, within two hours after milking and the temperature after the first or any subsequent milking shall not be warmer than 50°F;

b. Bacterial limit standard: (i) The bacteria count of raw milk shall not exceed 100,000 bacteria per milliliter prior to commingling with any other milk; and (ii) the bacteria count of raw milk that is commingled shall not exceed 300,000 bacteria per milliliter prior to pasteurization;

c. Cryoscope standard: Raw milk shall freeze at or below -0.530° Hortvet;

d. Drugs standard: Raw milk shall produce no zone greater than or equal to 16 millimeters when tested by the Bacillus sterothermophilus disc assay method or other equivalent method and shall have no positive results of tests for drug residues by detection methods reported to the State Regulatory Authority by milk plants, receiving stations, or transfer stations;

e. Somatic cell count standard: The somatic cell count of raw cow's milk or raw sheep's milk shall not exceed 1,000,000 somatic cells per milliliter through June 30, 1993. Effective July 1, 1993, raw cow's milk or raw sheep's

milk shall not exceed 750,000 somatic cells per milliliter. The somatic cell count of raw goat's milk shall not exceed 1,000,000 somatic cells per milliliter; and

f. Chemical residue or pesticide residue standard: Raw milk shall not exceed the actionable level, tolerance level, or safe level for any chemical residue or pesticide residue specified in: (i) 40 CFR Parts 180, 185, or 186; and (ii) 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 178 §1010, 189, 556, 564, 570, 573, 589. In the event that no actionable level, tolerance level, or safe level for a chemical residue or pesticides residue has been established in: (i) 40 CFR Parts 180, 185, or 186; and (ii) 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 564, 570, 573, 589, the tolerance level shall be deemed to be zero.

4. Grade A pasteurized or ultra-pasteurized, milk and milk products shall comply with the following standards:

a. Temperature standard: Milk and milk products shall be cooled to 45°F. or cooler but not frozen and maintained thereat;

b. Bacterial limit standard[6]: The bacteria count for any milk or milk products shall not exceed 20,000 bacteria per milliliter;

c. Coliform limit standard: Except for commingled milk shipped in a transport tank; the coliform count for any milk or milk products shall not exceed 10 coliform organisms per milliliter. Commingled milk shipped in a transport tank shall not exceed 100 coliform organisms per milliliter;

d. Phosphatase standard[8]: The phosphatase test result of any milk or milk product shall be less than 1 microgram per milliliter when tested by the Scharer Rapid Method or other equivalent method.

e. Drugs standard: Milk or milk products shall produce no zone greater than or equal to 16 millimeters when tested by the Bacillus sterothermophilus disc assay method or other equivalent method;

f. Chemical residue or pesticide residue standard: Milk or milk products shall not exceed the actionable level, tolerance level, or safe level for any chemical residue or pesticide residue specified in: (i) 40 CFR Parts 180, 185, or 186; and (ii) 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172,

173, 174, 175, 176, 177, 178, 189, 556, 564, 570, 573, 589. In the event that no actionable level, tolerance level, or safe level for a chemical residue or pesticides residue has been established in: (i) 40 CFR Parts 180, 185, or 186; and (ii) 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 564, 570, 573, 589, the tolerance level shall be deemed to be zero.

5. Grade A aseptically processed milk and milk products shall comply with the following standards:

a. Bacterial limit standard: The bacteria count of any aseptically processed milk and milk products shall demonstrate no growth;

b. Drugs standard: Aseptically processed milk and milk products shall produce no zone greater than or equal to 16 millimeters when tested by the Bacillus sterothermophilus disc assay method or other equivalent method;

c. Chemical residue or pesticide residue standard: Aseptically processed milk and milk products shall not exceed the actionable level, tolerance level, or safe level for any chemical residue or pesticide residue specified in: (i) 40 CFR Parts 180, 185, or 186; and (ii) 21 CFR Parts 70, 71, 73, 74, 80, 82, 130,

131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 564, 570, 573, 589. In the event that no actionable level, tolerance level, or safe level for a chemical residue or pesticides residue has been established in: (i) 40 CFR Parts 180, 185, or 186; and (ii) 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 564, 570, 573, 589, the tolerance level shali be deemed to be zero.

B. Sanitation requirements for grade A raw milk.

1. Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall comply with:

a. The following administrative procedures contained in the "Grade A Pasteurized Milk Ordinance --1989 Recommendations"[9]: Item lr, Item 2r, Item 3r, Item 4r, Item 5r, Item 6r, Item 7r, Item 8r, Item 9r, Item 10r, Item llr, Item 12r, Item 13r, Item 15r, Item 16r.1 through Item 16r.10, Item 17r, Item 18r, Item l9r.2, Item 20r, Item 21r;

b. The following appendices contained in the "Grade A Pasteurized Milk Ordinance -- 1989 Recommendations": Appendixes B.I, IV, V, VI, C, D, F, and G; and

c. The following requirements:

(1) Item lr. Abnormal milk.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Milk last or with separate equipment cows, sheep, or goats which show evidence of the secretion of abnormal milk in one or more quarters (based upon bacteriological, chemical, or physical examination) and discard the milk obtained from cows, sheep, or goats which show evidence of the secretion of abnormal milk in one or more quarters based upon bacteriological, chemical, or physical examination;

(b) Milk last or with separate equipment cows, sheep, or goats treated with, or which have consumed, chemical, medicinal, or radioactive agents which are capable of being secreted in the milk and which may be deleterious to human health; and dispose of in a manner which will not pollute the environment or any human food the milk obtained from cows, sheep, or goats treated with, or which have consumed, chemical, medicinal, or radioactive agents which are capable of being secreted in the milk and which may be deleterious to human health;

(2) Item 2r. Milking barn, stable, or parlor-- construction.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Provide on the person's dairy farm a milking barn, stable, or parlor in which the milking herd shall be housed during milking time; and

(b) Provide on the grade A permit holder's dairy farm a milking barn, stable, or parlor which, milking barn, stable, or parlor shall:

(a) Have floors constructed of concrete or equally impervious material;

(b) Have walls and ceiling which are smooth, painted, or finished in an approved manner, and in good repair and have a ceiling which is dust tight;

(c) Have separate stalls or pens for: (i) horses, (ii) calves, and (iii) bulls;

(d) Have natural or artificial light, well distributed for day or night milking;

(e) Have sufficient air space and air circulation to prevent condensation and excessive odors;

(f) Have dust-tight covered boxes or bins, or separate storage facilities for ground, chopped, or concentrated feed; and

(g) Not be over-crowded;

(3) Item 3r. Milking barn, stable, or parlor--cleanliness.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Keep the interior of the milking barn, stable, or parlor clean;

(b) Keep the floors, walls, windows, pipelines, and equipment in the milking barn, stable, or parlor free of filth or litter and clean; and

(c) Keep swine and fowl out of the milking barn, stable, and parlor.

(4) Item 4r. Cow yard, sheep yard, or goat yard.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Provide and maintain the cow yard, sheep yard, or goat yard, to be graded and drained, and to have no standing pools of water or accumulations of organic wastes;

(b) In the cow loafing, goat loafing, sheep loafing, cattle-housing, sheep-housing, or goat-housing areas remove cow droppings, sheep droppings, and goat droppings, and remove soiled bedding or add clean bedding at sufficiently frequent intervals to prevent the soiling of the cow's, sheep's, or goat's udders and flanks;

(c) Assure that waste feed does not accumulate in the goat yard, cow yard, sheep yard, cow loafing, sheep loafing, goat loafing, cattle-housing, sheep-housing, or goat-housing area;

(d) Maintain any manure packs so as to be properly drained and so as to provide a reasonably firm footing; and

(e) Keep swine and fowl out of the cow yard, sheep yard, goat yard, cow loafing, sheep loafing, goat loafing, cattle-housing, sheep-housing, or goat-housing area.

(5) Item 5r. Milkhouse or room--construction and facilities.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Provide a milkhouse or milkroom of sufficient size in which the cooling, handling, and storing of milk and the washing, sanitizing, and storing of milk containers and utensils shall be conducted;

(b) Provide a milkhouse with a smooth floor, constructed of concrete or equally impervious material graded to drain, and maintained in good repair;

(c) Dispose of in a sanitary manner all liquid waste generated in the milkhouse;

(d) Provide one or more floor drains in the milkhouse, which floor drains shall be: (i) accessible, and (ii) trapped, if connected to a sanitary sewer system;

(e) Provide in the milkhouse walls and ceilings constructed of a smooth material, in good repair, well painted, or finished in an equally suitable manner;

(f) Provide adequate natural or artificial light and ventilation in the milkhouse;

(g) Use the milkhouse for no other purpose than milkhouse operations;

(h) Provide no direct opening from the milkhouse into any barn, stable, or into any room used for domestic purposes, other than a direct opening between the milkhouse and milking barn, stable, or parlor provided with a tight-fitting, self-closing, solid door, which door has been hinged to be single or double acting;

(i) Provide in the milkhouse water under pressure which has been piped into the milkhouse;

(j) Provide in the milkhouse a two-compartment wash vat and adequate hot water heating facilities;

(k) Provide a suitable shelter for the receipt of milk when the grade A permit holder uses a transportation tank for the cooling and storage of milk on the grade A permit holder's dairy farm, which shelter shall comply with the following: (i) the shelter shall be adjacent to, but not a part of, the milkroom; and (ii) the shelter shall comply with the requirements of the milkroom with respect to construction, light, drainage, insect and rodent control, and general maintenance;

(6) Item 6r. Milkhouse or milkroom--cleanliness.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Keep clean the floors, walls, ceilings, windows, tables, shelves, cabinets, wash vats, non-product contact surfaces of milk containers, utensils, equipment, and other milkroom equipment in the milkroom;

(b) Place in the milkroom only those articles directly related to milkroom activities; and

(c) Keep the milkroom free of trash, animals, and fowl.

(7) Item 7r. Toilet.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:
(a) Provide on the person's grade A dairy farm one or more toilets, which toilets shall be conveniently located and properly constructed, and operated, and maintained in a sanitary manner;

(b) Prevent the access or flies to the waste contained in or from the toilet;

(c) Prevent the waste contained in or from the toilet from polluting the soil surface or contaminating any water supply; and

(d) Assure that there is no direct opening from the toilet into any milkroom.

(8) Item 8r. Water supply.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Provide water for milkhouse and milking operations from a water supply properly located, protected, and operated. The water supply shall be easily accessible, adequate, and of a safe, sanitary quality;

(b) Assure that any well casing which is part of a water supply that provides water for any milkhouse or milking operation is not located closer to any source of contamination which

may contaminate the water supply than is specified as follows:

(1) No grade A permit holder may locate a well casing closer than 10 feet to a pit;

(2) No grade A permit holder may locate a well casing closer than 10 feet to any sewer pipe, floor drain, or other pipe which may back up;

(3) No grade A permit holder may locate a well casing closer than 50 feet to any above-ground gas, oil, petroleum, or chemical storage tank;

(4) No grade A permit holder may locate a well casing closer than 50 feet to any accumulated animal manure;

(5) No grade A permit holder may locate a well casing closer than 50 feet to any: (i) area to which livestock has access; or (ii) animal-holding area, feedlot, or loafing area on dirt;

(6) No grade A permit holder may locate a well casing closer than 50 feet to any pit not drained to the surface of the ground. Nothing in this requirement shall apply to a residential basement;

(7) From and after September 1, 1993 no grade A permit holder may locate a well casing closer than 100 feet to any

pit privy. Existing well casings located on grade A dairy farms holding valid permits issued by the State Regulatory Authority on September 1, 1993 shall be exempt from the 100 foot distance requirement of §5(B)(l)(c)(8)(b)(7) until the existing permit is canceled or revoked;

(8) No grade A permit holder may locate a well casing closer than 100 feet to any animal-manure disposal area;

(9) No grade A permit holder may locate a well casing closer than 100 feet to any cess pool;

(10) No grade A permit holder may locate a well casing closer than 100 feet to any dry well;

(11) No grade A permit holder may locate a well casing closer than 100 feet to any structure which stores animal manure;

(12) No grade A permit holder may locate a well casing closer than 100 feet to any septic tank or drain field; and

(13) No grade A permit holder may locate a well casing closer than 100 feet to any underground or partially-buried gas, oil, petroleum, or chemical storage tank;

(c) Construct the water supply so that the well casing terminates at least two feet above the highest-known flood plane for the location in which the water supply is located; and

(D) Construct the water supply so that no potable water supply pipe attached to the water supply is located closer than 10 feet measured horizontally to any sewer pipe, soil pipe, or drain.

(9) Item 9r. Utensils and equipment--construction.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Provide multiuse containers, equipment, and utensils for use in the handling, storage, or transportation of any milk, which multiuse containers, equipment, and utensils shall: (i) be made of smooth, nonabsorbent, corrosion-resistant, and nontoxic materials; (ii) be so constructed as to be easily cleaned; and (iii) be in good repair;

(b) Provide milk pails which are constructed to be seamless and of the hooded type if the grade A permit holder does hand milking and stripping;

(c) Abstain from using multiple-use woven material for straining any milk;

(d) Use only single-service articles which have been manufactured, packaged, transported, stored, and handled in a sanitary manner and that comply with the requirements of §5(C)(l)(c)(11) of this regulations;

(e) Abstain from reusing any article intended for single-service use; and

(f) Provide farm holding or cooling tanks, welded sanitary piping, and transportation tanks which comply with the requirements of §5(C)(l)(c)(10), and §5(C)(l)(c)(ll) of this regulation on any grade A dairy farm;

(10) Item lOr. Utensils and equipment--cleaning.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Clean after each use the product-contact surfaces of all multiuse containers, multiuse equipment, and multiuse utensils used in the handling, storage, or transportation of any milk; and

(b) Offer for sale or sell no milk which has passed through any equipment, if the milk-contact surfaces of the equipment are no longer visible, or are covered or partially covered by an accumulation of milk solids, milk fat, cleaning compounds or other soils. Any milk which passes through equipment, the milk-contact surfaces of which are no longer visible,

or are covered or partially covered by an accumulation of milk solids, milk fat, cleaning compounds, or other soils shall be deemed adulterated;

(11) Item 11r. Utensils and equipment--sanitization.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall sanitize before each use the product contact surfaces of all multiuse containers, equipment, and utensils used in the handling, storage, or transportation of any milk;

(12) Item 12r. Utensils and equipment--storage.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall store containers, utensils, and equipment used in the handling, storage, or transportation of any milk in a sanitizing solution or store the containers, utensils, and equipment used in the handling, storage, or transportation of any milk to assure complete drainage, and protected from contamination prior to use. Nothing in this requirement shall be deemed to prohibit a grade A permit holder from storing in a milking barn or milking parlor a milk pipeline, or the following pipeline milking equipment: milker claw, inflation, weigh jar, meter, milk hose, milk receiver, tubular cooler, plate cooler, or milk pump; if the milk pipeline or pipeline milking equipment specified in this §5(B)(12)

is: (i) designed for mechanical cleaning; and (ii) designed, installed, and operated to protect the milk product and solution-contact surfaces from contamination at all times;

(13) Item 13r. Utensils and equipment--handling.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall handle all containers, utensils, and equipment in such a manner so as to prevent the contamination of any milk-contact surface of any containers, utensils, or equipment after the containers, utensils, or equipment have been sanitized;

(14) Item 14r. Milking--flanks, udders, and teats.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Milk all cows, sheep, and goats in a milking barn, stable, or parlor;

(b) Trim the hair from the udder and tail of all milking cows, sheep, and goats to facilitate cleaning of the udder and tail;

(c) Keep the flanks, udders, bellies, and tails of all milking cows, sheep, and goats free of visible dirt;

(d) Keep the hair on the udders of all milking cows, sheep, and goats to a length that the hair on the udder of any cow, sheep, or goat can not be incorporated with the teat in the inflation during milking;

(e) Abstain from milking any cow, sheep, or goat whose udder or teats is not clean and dry;

(f) Treat with a sanitizing solution, just prior to milking, the teats of each milking cow, sheep, and goat, and dry the teats of each milking cow, sheep, and goat before milking; and

(g) Milk all cows, sheep, and goats with dry hands;

(15) Item 15r. Milking--surcingles, milk stools, and antikickers.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall keep surcingles, milk stools, and antikickers clean and stored above the floor;

(16) Item 16r. Protection from contamination.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Locate and operate the milking and milk house operations, equipment, and facilities to prevent any contamination of the milk, equipment, containers, or utensils;

(b) Transfer immediately from the milking barn, stable, or parlor to the milkhouse each pail or container of milk;

(c) Strain, pour, transfer, or store any milk unless it is protected from contamination;

(d) Store all drugs and medicinals in such a manner that neither the drugs nor the medicinals can contaminate any milk or the milk product-contact surface of any equipment, containers or utensils;

(e) Abstain from using unapproved or improperly labeled medicinals or drugs to treat any dairy animals or store unapproved or improperly labeled medicinals or drugs in the milkhouse, milking barn, stable or parlor. Except for topical antiseptics, wound dressings, (unless intended for direct injection into the teat) vaccines and other biologics, and dosage form vitamins and mineral products a drug or medicinal is properly labeled only if the drug or medicinal is labeled with the following:

(1) For over-the-counter medicinals or drugs, the name and address of the manufacturer or distributor, or for Rx and extra-label use medicinals or drugs, the name of the veterinary practitioner dispensing the product;

(2) Directions for use of the drug or medicinal and the prescribed holding time;

(3) Any cautionary statement for the drug or medicinal, if needed; and

(4) The active ingredient or ingredients in the drug or medicinal;

(f) Except for topical antiseptics, wound dressings, (unless intended for direct injection into the teat) vaccines and other biologics, and dosage form vitamins and mineral products, segregate all medicinals and drugs used for lactating dairy animals from any medicinals and drugs used for non-lactating dairy animals;

(g) Except for topical antiseptics, wound dressings, (unless intended for direct injection into the teat) vaccines and other biologics, and dosage form vitamins and mineral products, provide separate shelves in a cabinet, refrigerator, or other storage facility for the storage of all medicinals and drugs for treatment of nonlactating dairy animals separate from those medicinals or drugs used for lactating dairy animals; and

(h) Store topical antiseptics, wound dressings, (unless intended for direct injection into the teat) vaccines and other biologics, and dosage-form vitamins and mineral products in a manner that does not contaminate any milk or the milk-product surfaces of any containers or utensils;

(17) Item 17r. Personnel--hand-washing facilities.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall provide hand-washing facilities that are convenient to the milkhouse, milking barn, stable, or parlor, and flush toilet and that include: (i) separate hot and cold running water; (ii) soap or detergent; and (iii) individual sanitary towels;

(18) Item 18r. Personnel--cleanliness.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Wash clean and dry with an individual sanitary towel the person's hands immediately before milking, before performing any milkhouse function, and immediately after the interruption of milking or performing any milkhouse function;

(b) Wear clean outer garments while milking or handling any milk, milk containers, utensils, or equipment. Milk haulers shall wear clean outer garments while handling any milk, milk containers, utensils, or equipment;

(19) Item 19r. Cooling.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) (i) Cool to 40° F. or cooler (but not freeze), all raw milk for pasteurization, ultra-pasteurization, or aseptic processing, within two hours after the grade A permit holder completes milking; and (ii) assure that the temperature of the grade A permit holder's raw milk is not warmer than 50° F after the first milking or any subsequent milking. Raw milk for pasteurization which is warmer than a temperature of 50°F. after the first milking or any subsequent milking shall be deemed a public health hazard and shall not be offered for sale or sold; and

(b) (i) Agitate all raw milk for pasteurization for not less than five minutes at least once every hour; (ii) assure that the milk in the farm's bulk milk cooling or holding tank covers the agitator paddle sufficiently to facilitate proper cooling and sampling after the completion of the first milking; and (iii) abstain from selling or offering for sale milk which does not cover the agitator paddle sufficiently to faciliatate proper cooling and sampling after the completion of the first milking;

(20) Item 2Or. Vehicles.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Transport from the grade A permit holder's dairy farm to a milk plant or receiving station all milk in cans, using vehicles which are constructed and

operated to protect the milk from sun, freezing, and contamination;

(b) Keep clean the inside and outside of each vehicle used to transport from the grade A permit holder's dairy farm to a milk plant or receiving station any milk in cans; and

(c) Transport no substance capable of contaminating the milk when transporting milk;

(21) Item 2lr. Insect and rodent control.

Any person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, or aseptic processing shall:

(a) Take effective measures to prevent the contamination of any milk, containers, equipment, and utensils by insects, rodents, and other animals, and by chemicals used to control insects, rodents, and other animals;

(b) Maintain the milkroom free of insects rodents and other animals; and

(c) Keep the areas surrounding the milkhouse, milking barn, milking stable, milking parlor, cattle, sheep, or goat housing, cattle, sheep, or goat loafing, water supply, or other facilities on the grade A permit holder's dairy farm neat, clean, and free of conditions

which might harbor or be conducive to the breeding of insects and rodents.

C. Sanitation requirements for grade A pasteurized, ultrapasteurized, or aseptically processed milk or milk products.

1. Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk or milk products shall comply with:

a. The following administrative procedures contained in the "Grade A Pasteurized Milk Ordinance --1989 Recommendations": Item lp, Item 2p, Item 3p, Item 4p, Item 5p, Item 6p, Item 7p, Item 8p, Item 9p, Item 10p, Item llp.1 through Item llp.9, Item 12p.1 through Item 12p.5, Item 12p.7, Item 13p, Item 14p, Item 15p, Item 16p, Item 17p, Item 18p, Item l9p, Item 20p, Item 21p, and Item 22p.

b. The following appendices contained in the "Grade A Pasteurized Milk Ordinance --1989 Recommendations": Appendices, C, D, F, G, H, I, and J; and

c. The following requirements:

(1) Item lp. Floors--construction.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Except as specified in §5(C)(l)(c)(l)(b), provide floors for all rooms in which milk or milk products are processed, handled, or stored, or in which milk containers, equipment, or utensils are washed: (i) constructed of concrete or other equally impervious and easily cleaned material; and (ii) which are smooth, properly sloped, provided with trapped drains, and kept in good repair;

(b) The floor in any cold-storage room used for storing milk and milk products need not be provided with floor drains if the floors are sloped to drain to one or more exits from the cold-storage room. The floor in any storage room used for storing dry ingredients or packaging materials need not be provided with drains and the floor in any storage room used for storing dry ingredients or packaging materials may be constructed of tightly joined wood;

(2) Item 2p. Walls and ceilings--construction.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall provide walls and ceilings of rooms in which milk or milk products are handled, processed, or stored, or in which milk containers, utensils, or equipment are washed, that have a smooth, washable, light-colored surface, and that are in good repair;

(3) Item 3p. Doors and windows.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Provide effective means to prevent the access of flies and rodents to any part of a milk plant, receiving station, or transfer station; and

(b) Provide solid doors or glazed windows for all openings to the outside of any milk plant, receiving station, or transfer station and keep the doors and windows closed during dusty weather;

(4) Item 4p. Lighting and ventilation.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall provide rooms in which any milk or milk products are handled, processed, or stored or in which any milk containers, equipment, or utensils are washed, that are well lighted and well ventilated;

(5) Item 5p. Separate rooms.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Provide separate rooms for: (i) Pasteurizing, processing, cooling, and packaging milk or milk products; (ii) cleaning milk cans, bottles, and cases; (iii) cleaning and sanitizing facilities for bulk milk transport tanks if the grade A permit holder receives any milk or milk product in bulk milk transport tanks; and (iv) receiving cans of milk and milk products separate from (i) and (ii) above, unless all of the grade A permit holder's milk or milk products are received in bulk milk transport tanks;

(b) Use any room with a direct opening into any stable or room used for domestic purposes to: (i) handle, process, or store any milk or milk products; or (ii) wash or store any milk containers, utensils, or equipment; and

(c) Use rooms of sufficient size so as not to be crowded to: (i) handle, process, or store any milk or milk products; or (ii) wash or store any milk containers, utensils, or equipment;

(6) Item 6p. Toilet-sewage disposal facilities.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Provide each milk plant with toilet facilities conforming with the regulations of the Commonwealth and the following requirements: (i) no toilet room may open directly into any room in which milk or milk products are processed; (ii) the toilet room shall

be completely enclosed and shall have tight-fitting, self closing doors; (iii) the dressing room, toilet room, and fixtures shall be kept in a clean condition, in good repair, and shall be well ventilated and well lighted; and (iv) sewage and other liquid wastes from the toilet room shall be disposed of in a sanitary manner;

(7) Item 7p. Water supply.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Provide water for each milk plant from a supply which is properly located, protected, and operated; and

(b) Provide water from a supply which is easily accessible for inspection by the State Regulatory Authority, adequate, and of a safe, sanitary quality;

(8) Item 8p. Hand-washing facilities.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Provide hand-washing facilities, including separate hot and cold running water, mix valve, soap, and individual sanitary towels or other approved hand-drying devices, convenient in: (i) any area where milk or milk products are

handled, processed, or stored, and (ii) any area where containers, utensils, or equipment, are washed or stored; and

(b) Keep the hand-washing facilities clean and in good repair;

(9) Item 9p. Milk plant cleanliness.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Keep clean, neat, and free of any evidence of animals, insects or rodents, all rooms: (i) in which milk or milk products are handled, processed, or stored; or (ii) in which containers, utensils, or equipment are washed or stored;

(b) Use pesticides safely; and

(c) Permit only equipment directly related to processing operations or to the handling of containers, utensils, and equipment, in pasteurizing, processing, cooling, packaging, or bulk milk storage rooms;

(10) Item 10p. Sanitary piping.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Use only sanitary piping, fittings, and connections consisting of smooth, impervious corrosion-resistant, nontoxic, easily cleanable materials that are exposed to any milk or milk products, or from which liquids may drip, drain, or be drawn into any milk or milk products;

(b) Keep all piping in good repair;

(c) Except as specified in §5(C)(l)(c)(10)(d), use only sanitary piping to transfer any pasteurized or ultrapasteurized milk or milk products from one piece of equipment to another piece of equipment; and

(d) Transport cottage cheese, cheese dressings, or cheese ingredients by methods which protect the product from contamination;

(11) Item llp. Construction and repair of containers and equipment.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Use only multiuse containers and equipment that may come in contact with any milk or milk products: (i) constructed of smooth, impervious, corrosion-resistant, and nontoxic materials; (ii) constructed for ease of cleaning; and (iii) kept in good repair;

(b) Use only single-service containers, closures, gaskets, and other articles that may come in contact with any milk or milk products that: (i) are nontoxic, and (ii) have been manufactured, packaged, transported, and handled in a sanitary manner;

(c) Abstain from using more than once any articles intended for single-service use; and

(d) Use only single-service containers, closures, caps, gaskets, and similar articles manufactured, packed, transported, and handled in a manner which complies with the requirements of "Standards for the Fabrication of Single-Service Containers and Closures for Milk and Milk Products--1991 revision,"[10];

(12) Item 12p. Cleaning and sanitizing of containers and equipment.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Effectively clean and sanitize before each use the product-contact surfaces of all multiuse containers and equipment, utensils, and equipment used in the transportation, processing, handling, and storage of any milk or milk products;

(b) Use only multi-use containers for packaging pasteurized milk and milk products that comply with the following: (i) the residual bacteria

count on multi-use containers may not exceed one per milliliter of capacity when the rinse test is used, or the residual bacteria count on multi-use containers may not exceed 50 colonies per eight square inches (one per square centimeter) of product-contact surface, when the swab test is used; in three-out-of-four samples taken at random on a given day; and (ii) all multi-use containers shall be free of coliform organisms; and

(c) Use only single-service containers for packaging pasteurized milk and milk products that comply with the following: (i) the residual bacteria count of single-service containers shall not exceed 50 per container, when the rinse test is used, except that in containers less than 100 milliliters, the count shall not exceed 10, or the residual bacteria count of single-service containers shall not exceed 50 colonies per eight square inches (one per square centimeter) of product contact surface, when the swab test is used; in three-out-of-four samples taken at random on a given day; and (ii) all single-service containers shall be free of coliform organisms;

(13) Item 13p. Storage of cleaned containers and equipment.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall after cleaning any multiuse milk or milk product containers, utensils, or equipment, transport or store the multiuse milk or milk

product containers, utensils, or equipment: (i) in a manner that assures complete drainage; and (ii) in a manner that protects the multiuse milk or milk product containers, utensils, or equipment from contamination before use;

(14) Item 14p. Storage of single-service containers, utensils, and materials.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Purchase all single-service caps, cap stock, parchment paper, containers, gaskets, and other single-service articles for use in contact with milk or milk products, in sanitary tubes, wrappings, or cartons;

(b) Store in a clean dry place until used, single-service caps, cap stock, parchment paper, containers, gaskets, and other single-service articles for use in contact with milk or milk products;

(c) Store single-service caps, cap stock, parchment paper, containers, gaskets, and other single-service articles for use in contact with milk or milk products in sanitary tubes, wrappings, or cartons; and

(d) Handle single-service caps, cap stock, parchment paper, containers, gaskets, and other single-service articles for use in contact with milk or milk products in a sanitary manner;

(15) Item 15p. Protection from contamination.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Locate the person's equipment and facilities and conduct milk plant operations to prevent any contamination of any milk or milk products, ingredients, equipment, containers, or utensils;

(b) Discard all milk, milk products, or ingredients which have been spilled, overflowed, or leaked;

(c) Perform the processing and handling of products other than milk and milk products in the person's milk plant to preclude the contamination of any milk or milk products;

(d) Store, handle, or use any toxic material to preclude the contamination of any milk. milk product, or ingredient, and the milk product-contact surfaces of all equipment, containers, or utensils; and

(e) Clean, prior to use, all multi-use cases used to encase packaged milk or milk product containers;

(16) Item 16p. Pasteurization and ultra-pasteurization.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall perform pasteurization, ultra-pasteurization, or aseptic processing as defined in §1 of this regulation;

(17) Item 17p. Cooling of milk.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Maintain all raw milk and milk products at a temperature of 45° F. or cooler, but not frozen, until processed;

(b) Immediately cool, except for milk or milk products to be cultured, all pasteurized or ultra-pasteurized milk or milk products prior to filling or packaging in approved cooling equipment to a temperature of 45° F. or cooler, but not frozen;

(c) Store at a temperature of 45° F. or cooler, but not frozen, all pasteurized or ultra-pasteurized milk or milk products; and

(d) Equip with an accurate thermometer each of the rooms or tanks in which any milk or milk products are stored;

(18) Item 18p. Bottling and packaging.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Bottle or package all milk or milk products (except for cottage cheese, dry curd cottage cheese and lowfat cottage cheese) at the place of pasteurization in the grade A permit holder's milk plant and in approved mechanical equipment; and

(b) Transport all cottage cheese, dry curd cottage cheese, or lowfat cottage cheese not creamed or packaged in the grade A permit holder's milk plant; (i) in sealed containers; and (ii) in a protected, sanitary manner from the grade A permit holder's milk plant to another grade A permit holder's milk plant for creaming or packaging;

(19) Item 19p. Capping.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Cap or close all milk or milk product containers in a sanitary manner by use of approved mechanical capping or closing equipment; and

(b) Use only caps or closures for all milk or milk products, which protect the pouring lip of a milk or milk product container to at least its

largest diameter and, use with respect to fluid product containers, only caps or closures that the removal of the cap or closure cannot be made without detection;

(20) Item 20p. Personnel--cleanliness.

No person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall:

(a) Permit any person in a milk plant to commence any plant function before the person has thoroughly washed the person's hands to remove soil and contamination or to permit any person in a milk plant to continue any plant function if the person's hands are not clean;

(b) Permit any person in a milk plant to resume work after the person has visited the toilet room before the person has thoroughly washed the person's hands;

(c) Permit any person in a milk plant to engage in the processing, pasteurization, handling, storage, or transportation of any milk, milk products, containers, equipment or utensils, unless the person is wearing clean outer garments;

(c) Permit any person in a milk plant, to engage in the processing of any milk or milk products unless the person wears adequate hair covering; and

(d) Permit any person in a milk plant, to engage in the processing of any milk or milk products if the person is using tobacco;

(21) Item 21p. Vehicles.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall use vehicles to transport pasteurized and ultra-pasteurized milk and milk products that are constructed and operated so that the milk or milk products are: (i) maintained at a temperature of 45° F. or cooler, but not frozen; and (ii) protected from sunlight, from freezing, and from contamination;

(22) Item 22p. Surroundings.

Any person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, or aseptically processed milk, or milk products shall keep neat, clean, and free from conditions which might attract or harbor flies, other insects, rodents, or which otherwise constitute a nuisance, the area surrounding any milk plant;

(23) Any grade A permit holder's receiving station shall comply with §5(C)(l)(c)(l) through §5(C)(l)(c)(15), inclusive, and §5(C)(l)(c)(17), (20), and (22), except that the partitioning requirement of §5(C)(l)(c)(5) shall not be deemed to apply;

(24) Any grade A permit holder's transfer station shall comply with §§5(C)(1)(c)(1), (4), (6), (7), (8), (9), (10), (11), (12), (14), (15), (20), and (22); and as

climatic and operating conditions require, the provisions of §§5(C)(l)(c)(2) and (3); except that each person shall provide overhead protection for a transfer station;

(25) Any grade A permit holder's facilities for the cleaning and sanitizing of bulk tanks which transport milk and milk products in the grade A permit holder's milk plant, receiving station, or transfer station shall comply with §§5(C)(l)(c)(l), (4), (6), (7), (8), (9), (10), (11), (12), (14), (15), (20), and (22); and as climatic and operating conditions require, the provisions of §§5(C)(l)(c)(2) and (3); except that each grade A permit holder shall provide overhead protection for facilities for the cleaning and sanitizing of bulk tanks which transport milk and milk products in the grade A permit holder's milk plant, receiving station, or transfer station.

§ 6. Animal health.

No person may produce in, provide in, manufacture in, sell in, offer for sale in, store in, bring into, send into, or receive into, the Commonwealth any milk, milk product, or condensed and dry milk product for use in the commercial preparation of grade A pasteurized, ultra-pasteurized, or aseptically processed milk or milk product unless the person complies with the following requirements:

A. Milk for pasteurization or ultra-pasteurization or aseptic processing shall be from a herd that complies with the "Uniform Methods and Rules; Bovine Tuberculosis Eradication-- effective February 3, 1989,"[11] 9 CFR Part 77, and the following:

(i) Each herd shall be located in a Modified Accredited Tuberculosis Area or an Area Accredited Free of Bovine Tuberculosis as defined in "Uniform Methods and Rules; Tuberculosis Eradication--effective February 3, 1989" and certified by the U.S. Department of Agriculture; or (ii) shall have passed an annual tuberculosis test;

B. Milk for pasteurization or ultra-pasteurization or aseptic processing shall be from a herd that complies with "Uniform Methods and Rules; Brucellosis Eradication-- effective May 6, 1992,"[12] 9 CFR Part 78; and the following:

(1) Each herd shall be located in a Certified Brucellosis-Free Area or a Modified Certified Brucellosis Area as defined in "Uniform Methods and Rules; Brucellosis Eradication-- effective May 6, 1992" and certified by the United States Department of Agriculture and enrolled in a testing program for the Certified Brucellosis-Free Area or the Modified Certified Brucellosis Area; or

(2) Each herd shall meet the requirements for an individually certified herd as defined in "Uniform Methods and Rules; Brucellosis Eradication-- effective May 6, 1992"; or

(3) Each herd shall participate in a milk ring testing program meeting the requirements specified in "Uniform Methods and Rules; Brucellosis Eradication-- effective May 6, 1992" in an area that conducts a milk ring testing program at least four times per year at

approximately equal intervals, and any herd with a positive milk ring test result shall be blood tested within 30 days from the date of the positive milk ring test; or

(4) Each cow in the herd shall be individually tested by an "official" blood test as defined in "Uniform Methods and Rules; Brucellosis Eradication" for the detection of brucellosis annually;

C. Goat's milk and sheep's milk for pasteurization or ultrapasteurization or aseptic processing shall be from a herd or flock which has passed an annual whole-herd tuberculosis and brucellosis test;

D. For diseases of cows, sheep, or goats which might affect human health, other than brucellosis and tuberculosis, the State Regulatory Authority may require physical, chemical, or bacteriological examinations or other tests as may be deemed necessary by a licensed veterinarian or a veterinarian in the employ of the State Regulatory Authority to diagnose the disease. Each grade A permit holder shall dispose of any diseased animal disclosed by testing in a manner which prevents the spread of the disease to other animals or humans.

§ 7. Milk or milk products which may be sold.

A. Except as specified in §7(B) from and after the date these regulations are effective, a person may sell in, offer for sale in, or expose for sale in the Commonwealth only grade A pasteurized, ultra-pasteurized, or aseptically processed milk or milk

products to the final consumer, or to restaurants, soda fountains, and grocery stores.

B. No person may sell in, offer for sale in, or expose for sale in the Commonwealth any pasteurized, ultra-pasteurized, or aseptically processed milk or milk products which have not been graded or the grade of which is not known to the final consumer, or to restaurants, soda fountains, and grocery stores unless the Commissioner of Agriculture and Consumer Services makes a finding in writing (which the Commissioner of Agriculture and Consumer Services may renew for terms not to exceed 90 days per term, without limitation) that: (i) the supply of grade A raw milk for pasteurization, ultrapasteurization, or aseptic processing is not adequate to meet the nutritional needs of any person who secures milk in Virginia; or (ii) the supply of pasteurized, ultrapasteurized, or aseptically processed milk or milk product at retail is not available for purchase by any person who secures milk in Virginia.

C. No person may sell in, offer for sale in, expose for sale in, or possess in the Commonwealth any pasteurized, ultrapasteurized, or aseptically processed milk or milk products under the provision of §7(B) unless the milk or milk product is labeled "ungraded."

§ 8. Transferring, delivery containers, cooling.

A. No person, except as authorized in these regulations, may transfer any milk or any milk product from one container or tank truck to another container or tank truck in any place except a milk plant, receiving station, transfer station, or milkhouse

especially used for that purpose and no person may dip or ladle any milk or milk product;

B. No person may sell or serve to the public any milk or fluid milk product except in the individual, original container received from the milk distributor, or from an approved bulk dispenser. Nothing in §8(A) of this regulation is deemed to prohibit any person from: (i) transferring milk from one container to another container for the purpose of mixing drinks, if the amount of milk required is less than one-half pint of milk; or (ii) from using an original container of not more than one-half gallon capacity or an approved bulk dispenser to serve cream, whipped cream, or half-and-half, which is to be sold or served to the public;

C. No person may sell or serve to the public any pasteurized or any ultra-pasteurized milk or milk product which has not been maintained at a temperature of 45° F. or cooler, but not frozen. No person may store any pasteurized or ultrapasteurized containers of milk or milk products in ice unless the container is properly drained.

§ 9. Milk and milk products from beyond the limits of routine inspection.

No person may provide in, sell in, offer for sale in, store in, bring into, send into, or receive into, the Commonwealth any milk or milk product from outside the Commonwealth unless the milk or milk products are produced and pasteurized, ultrapasteurized, or aseptically processed under regulations which are substantially equivalent to these regulations and the supply of the milk or the milk plant that produced the milk or milk product has been awarded a milk

sanitation compliance rating of at least 90 and an enforcement compliance rating of at least 90, made by a state milk sanitation rating officer certified by the United States Public Health Service.

§10. Construction plans for dairy farms and milk plants.

No grade A permit holder may construct, reconstruct, or modify a milkhouse, milking barn, stable, or parlor, transfer station, receiving station, or milk plant regulated under these regulations without submitting to the State Regulatory Authority written plans for review and approval before construction work is begun.

§11. Personnel health.

A. No person affected with any disease in a communicable form, or while a carrier of a communicable disease, may work at any dairy farm or milk plant in any capacity which brings the person into contact with the production, handling, storage, or transportation of milk or milk products, or into contact with milk or milk product containers, equipment, or utensils.

B. No person holding a grade A permit may employ any person having, or suspected of having, any disease in a communicable form, or of being a carrier of a communicable disease.

C. Any grade A permit holder who produces or distributes milk or milk products, upon whose dairy farm, or in whose milk plant any communicable disease occurs, or who suspects that any employee has contracted any disease in a communicable form, or has

become a carrier of a communicable disease, shall notify the State Regulatory Authority immediately.

§ 12. Procedure when infection is suspected.

When reasonable cause exists to suspect the possibility of transmission of infection of a communicable disease from any person concerned with the handling of milk or milk products to any other person, the person concerned with the handling of milk or milk products and the person holding the grade A permit shall comply with any or all of the following measures:

A. The immediate exclusion of that person from milk handling;

B. No grade A permit holder may sell or offer for sale any milk or milk products that have been handled by or exposed to a person who is suspected of having a communicable disease or being a carrier of a communicable disease;

C. Any person who is suspected of having a communicable disease or being a carrier of a communicable disease and his associates, at the discretion of the State Regulatory Authority, shall submit to medical and bacteriological examination by a licensed physician in the Commonwealth sufficient to make a medical diagnosis.

§ 13. Grade A condensed and dry milk products and condensed and dry whey.

A. No person may produce in, provide in, manufacture in, sell in, offer for sale in, store in, bring into, send into, or receive into, the Commonwealth any

condensed and dry milk product for use in the commercial preparation of grade A pasteurized, ultra-pasteurized, or aseptically processed milk or milk product if the person does not comply with:

1. The following sections of Part II of the "Grade A Condensed and Dry Milk Products and Condensed and Dry Whey Recommended Sanitation Ordinance for Condensed and Dry Milk Products and Condensed and Dry Whey used in Grade A Pasteurized Milk Products - Supplement I to the Grade A Pasteurized Milk Ordinance - 1978 Recommendations of the United States Public Health Service/Food and Drug Administration, 1978 Edition" [13] and "Supplement I -- 1978 Grade A Condensed & Dry Milk Ordinance (DMO)[14]:

Section 2;
Section 4;
Section 7(except that the temperature standard for grade "A" raw milk for pasteurization shall be 40°F or cooler, but not frozen);
Section 8;
Section 9;
Section 10;
Section 11; and

2. The following appendices contained in the "Grade A Condensed and Dry Milk Products and Condensed and Dry Whey Recommended Sanitation Ordinance for Condensed and Dry Milk Products and Condensed and Dry Whey used in Grade A Pasteurized Milk Products - Supplement I to the Grade A Pasteurized Milk Ordinance - 1978 Recommendations of the United States Public Health Service/Food and

Drug Administration, 1978 Edition":
Appendices A, B, C, D, E, F, and H.

§14 Interpretation and enforcement.

A. This regulation is based on the "Grade A Pasteurized Milk Ordinance--1989 recommendations." Except as otherwise provided in this regulation, the provisions of this regulation shall be interpreted in a manner consistent with interpretations accorded the "Grade A Pasteurized Milk Ordinance--1989 recommendations".

B. The administrative procedures used to conduct case decisions under this regulation shall be consistent with the provisions of the Virginia Administrative Process Act.

C. The State Regulatory Authority shall comply with the following administrative procedures when summarily suspending a grade A permit as specified in §3(C) of this regulation:

1. The State Regulatory Authority shall serve upon the grade A permit holder a written notice of suspension. The written notice of suspension shall specify the violations in question and inform the grade A permit holder of the right to appear before the State Regulatory Authority in person, by counsel, or by other qualified representative at a fact-finding conference for the informal presentation of factual data, arguments, and proof to appeal this determination of violation;

2. Upon receipt of written application from any person whose grade A permit has been summarily suspended (within 30 days after the effective date of the summary suspension) the State Regulatory Authority shall within seven days after the date of receipt by the State Regulatory Authority of a written application from any person whose grade A permit has been summarily suspended proceed to hold an informal fact-finding conference to ascertain the facts of the violations in question and upon evidence presented at the informal fact-finding conference shall affirm, modify, or rescind the summary suspension;

3. The State Regulatory Authority shall, unless the parties consent, ascertain the fact basis for their decisions of cases through informal conference proceedings. Such conference proceedings include the rights of parties to the case: (i) to have reasonable notice thereof, (ii) to appear in person or by counsel or other qualified representative before the State Regulatory Authority for the informal presentation of factual data, argument, or proof in connection with any case, (iii) to have notice of any contrary fact basis or information in the possession of the agency which can be relied upon in making an adverse decision, (iv) to receive a prompt decision of any application for license, benefit, or renewal thereof, and (v) to be informed, briefly and generally in writing, of the factual or procedural basis for an adverse decision in any case;

4. No person whose grade A permit has been summarily suspended may be granted an informal fact-finding conference by the State Regulatory Authority unless the State Regulatory Authority receives the person's written application within 30 days after the effective date of the summary suspension;

5. From any adverse decision of an informal fact-finding conference, the grade A permit holder may request a formal hearing under §9-6.14:12 of the Code of Virginia (1950), as amended, by writing the Director, Division of Dairy and Foods within 30 days stating the request and by providing the State Regulatory Authority with a statement of the issues in dispute. If the request for a formal conference is denied, the State Regulatory Authority shall notify the grade A permit holder in writing and further may affirm or modify the decision of the informal fact-finding conference; and

6. If a formal fact-finding conference is denied, the State Regulatory Authority shall notify the grade A permit holder of the right to file an appeal in the circuit court.

1. "IMS LIST -- Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers"; the current edition of this publication contains the list of officially designated laboratories and may be obtained from the U. S. Food and Drug Administration, Milk Safety Branch, HFF-346, 200 'C' Street, S. W., Washington, D.C., 20204.

2. "Milk and Dairy Beef Residue Prevention Protocol," available from Milk & Dairy Beef Quality Assurance Center, 801 Shakespeare, Box 497, Stratford, Iowa, 50294.

3. "Determination of Vitamin D2 and Vitamin D3 in Foods, Feeds, and Pharmaceuticals, Using High Performance Liquid Chromatography: Comparison of Three Different Columns," Melina C. Villalobos, Norman R. Gregory & Martin P. Bueno, Food and Drug Administration, Center for Food Safety and Applied Nutrition, Division of Nutrition, HFF-266, Washington, D.C., 20204.

4. "HPLC Assays for Vitamin A and E (HPLC Method 1)," available from Laboratory Assurance Branch, HFH-450, Division of Microbiology, Food and Drug Administration Center for food Safety, 6502 S. Archer Road, Summit Argo, IL, 60501-1399.

5. "Evaluation of Animal Drug Residue Detection Methods," J. Russell Bishop, Susan E. Duncan, Gerald M. Jones, and William D. Whittier, available from Food Science and Technology, Virginia Polytechnic Institute and State University, Blacksburg, Virginia, 24061.

6. "IMS List -- Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers," specifies the requirements for the "National Uniform Coding System for Packaging Identification of Milk and Milk Product Processing Plants" and list the code for each milk or milk product processing plant. This document is available from the U. S. Food and Drug Administration, Milk Safety Branch, HFF-346,200 "C" Street, S. W., Washington, D.C., 20204.

7. The bacteria limit standard is not applicable to cultured milk products.

8. The phosphatase standard is not applicable to bulk shipped heat treated milk products.

9. "Grade A Pasteurized Milk Ordinance --1989 Recommendations" is available from U. S. Food and Drug Administration, Milk Safety Branch, HFF-346, 200 "C" Street, S. W., Washington, D.C., 20204.

10. "Standards for the Fabrication of Single-service Containers and Closures for Milk and Milk Products", 1991 revision, is available from the U. S. Food and Drug Administration, Milk Safety Branch, HFF-346, 200 'C' Street, S. W., Washington, D. C. 20204.

11. "Uniform Methods and Rules; Bovine Tuberculosis Eradication-- effective February 3, 1989," is available from Veterinary Services, Animal and Plant Health Inspection Service, U. S. Department of Agriculture, Federal Center Building, Hyattville, Maryland, 20782 or Federal Veterinarian in Charge, VS, APHIS, USDA, Sixth Floor, Washington Building, 1100 Bank Street, Richmond, Virginia, 23219.

12. "Uniform Methods and Rules; Brucellosis Eradication--effective May 6, 1992" is available from Veterinary Services, Animal and Plant Health Inspection Service, U. S. Department of Agriculture, Federal Center Building, Hyattville, Maryland, 20782 or Federal Veterinarian in Charge, VS, APHIS, USDA, Sixth Floor, Washington Building, 1100 Bank Street, Richmond, Virginia, 23219.

13. "Grade A Condensed and Dry Milk Products and Condensed and Dry Whey", supplement I to the "Grade A Pasteurized Milk Ordinance", 1978 recommendations, is available from U. S. Food and Drug Administration, Milk Safety Branch, HFF-346, 200 "C" Street, S. W., Washington, D.C., 20204.

14. "Supplement I --1978 Grade A Condensed & Dry Milk Ordinance (DMO)" was issued December 11, 1992 and is available from U. S. Food and Drug Administration, Milk Safety Branch, HFF-346, 200 "C" Street, S. W., Washington, D.C., 20204.

STATE OF NEBRASKA (402) 471-2541
Department of Health
Mark B. Horton, M.D., M.S.P.H.
Director

September 14, 1992

John S. Coles
Route 18, Box 21
Charlottesville, VA 22901
Re: Dairy

Dear Mr. Coles:

Please excuse my delay in answering your letter of July 18, 1992.

The State of Nebraska, Department of Agriculture has adopted the current issue of the Pasteurized Milk Ordinance (PMO) as the State Milk Ordinance. With goat milk defined in the PMO any grade "A" goat dairies would be governed by this code. At present we have no Grade "A" or Grade "B" goat dairies.

Nebraska has always permitted the sale of raw milk, but only casual sales direct from the farm and advertising in not permissible.

Hopefully this answers your questions. If not please contact me any time.

Sincerely,
/s/Allan Ackerman
Allan Ackerman, R.S.
State Milk Rating Officer
Division of Drinking Water and
Environmental Sanitation AA/tc

OKLAHOMA STATE DEPARTMENT OF HEALTH
1000 NE TENTH
OKLAHOMA CITY, OK 73117-1299

Joan K. Leavitt, M.D.
Commissioner

Board of Health
John B. Carmichael, D.D.S.
President
Ernest D. Martin, R. Ph.
Vice President
Burdge F. Green M.D.
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Dan H. Fieker, D.O.
Linda M. Johnson, M.D.
Walter Scott Mason, III
Lee W. Paden

September 28, 1992

Mr. John S. Coles
Virginia State Dairy Goat Association
Route 18, Box 21
Charlottesville, VA 22901

Dear Sir:

Oklahoma centralized their milk regulatory program in July of 1974. The laws regulating Grade A raw milk distribution were in effect prior to that time.

The Pasteurized Milk Ordinance used by the states to regulate Grade A milk prohibits interstate shipment of packaged raw milk, however, it has provisions allowing for incidental sales of raw milk at the dairy.

I have also enclosed a copy of our most recent raw milk legislation for your information. The Act passed May 8, 1989

allows for unregulated sale of raw goat milk not to exceed 100 gallons per month.

I hope this information is what you needed.

Sincerely,
/s/ Dan Rackley
Dan Rackley, Director
Milk Sanitation Division
Consumer Protection Service

DR:ep

Enclosure

1994 SESSION

LD4908486

HOUSE BILL NO. 1061

Offered January 25, 1994

A BILL to exempt certain on-farm sales of goat milk from any and all regulations governing the production, processing and sale of grade "A" pasteurized milk; penalty.

Patrons-Way, Bennett, Bloxom, Cantor, Christian, Connally, Cooper, Crouch, Darner, Dillard, Dudley, Fisher, Forbes, Giesen, Harris, Hull, Ingram, Katzen, Keating, Marshall, Martin, Mayer, McDonnell, Miller, Nelms, Plum, Purkey, Putney, Reid, Reynolds, Robinson, Stump, Van Landingham, Van Yahres, Wagner, Wardrup, Watkins and Wilkins; Senators: Bell, Benedetti, Calhoun, Chichester, Gartlan, Houck, Lambert, Marye, Miller, K.G., Quayle, Robb and Trumbo

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Be it enacted by the General Assembly of Virginia:

1. § *1. Incidental sales and delivery of raw goat milk directly to consumers at the farm where the milk is produced shall be exempt from any and all regulations governing the production, processing, and sale of grade "A" pasteurized milk, provided that there is no advertisement of the milk and the herd is certified and accredited as free of brucellosis and tuberculosis. Each container shall be labeled clearly "Raw Goat Milk, not for resale" and shall identify the farm where the milk was produced and sold. The label shall also include the specific wording: "Warning: Raw Goats' Milk, not pasteurized, may contain organisms injurious to your health. Please consult pamphlet which is provided with this container for information concerning potential health risks, and instructions on how to pasteurize milk." The Board of*

Agriculture and Consumer Services shall promulgate regulations regarding the form and manner of the label. Each consumer shall be given a pamphlet, to be developed by the Department of Agriculture and Consumer Services and the Department of Health, describing risks associated with consumption of raw milk and including instructions on how to pasteurize it. The development of both the label and the pamphlet shall be completed for use by July 1, 1995. For purposes of this section, "incidental sales" of goat milk are those sales where the monthly number of gallons sold does not exceed 100. Producers shall report on a quarterly basis to the Department of Agriculture and Consumer Services the number of gallons sold in the previous quarter. The report shall be filed with the Department not later than ten days after the end of the quarter. Any person violating a provision of this section may be assessed a civil penalty by the Board of Agriculture and Consumer Services in an amount not to exceed $100 per violation.

The provisions of this section shall expire on July 1, 1998.

United States District Court For The Western
District of Virginia

Civil Action, File Number 94-0048-C

Filed November 4, 1994

Christine Solem, Plaintiff

v.

Amended
Complaint for Declaratory Relief

J. Carlton Courter, III,
Commissioner of Agriculture
and Consumer Services, Defendant

1. Plaintiff is a citizen of the State of Virginia, County of Albemarle and Defendant represents in an official capacity the Department of Agriculture and Consumer Services, State of Virginia. The action arises under the 14th Amendment to the Constitution of the United States, Section No. 1, the Act of June 25, 1948, 62 Stat. 930; U.S.C., Title 28 , §1331, and involves a state law that is not unclear. Federal Court is being asked to intervene on behalf of overreaching constitutional right rather than to interfere with comprehensive state regulatory scheme.

2. Plaintiff has been engaged in a controversy since Nov. of 1979 with the Department of Agriculture and Consumer Services, including, but not limited to, three appearances in Albemarle Circuit Court and two appearances in the Virginia Supreme Court concerning sales of ungraded raw goats' milk from her farm

3. As a result of this controversy Plaintiff was enjoined specifically form violating Regulation X of the

Regulations Governing the Production, Processing, and Sale of Grade "A" Pasteurized Market Milk and Grade "A" Pasteurized Market Milk Products and Certain Milk Products.

4. However, in September of 1993 Regulations Governing Grade "A" Milk became effective, superseding the old regulations cited in paragraph No. 3. The injunction against Plaintiff no longer applies, according to remarks made by the Judge and Counsel for the Defendant in the Albemarle Circuit Court on April 25, 1994, which are highlighted in yellow and attached here as Exhibit "A".

5. Defendant has stated that if Plaintiff sells any raw goats' milk for human consumption that he would ask for the injunction against her to be amended, (see Exhibit "A"). Plaintiff wishes to sell ungraded raw goats' milk in accordance with the circumstances outlined below, and declares that she has a constitutional right to do so.

6. Defendant has applied the prohibition against ungraded raw goats' milk sales in Regulation VII of the new Regulations Governing Grade "A" Milk to include the circumstances in which Plaintiff, producing ungraded raw goats' milk on her own farm, is approached by an individual wishing to buy, on his own initiative, excess ungraded raw goats' milk at that farm for that individual's own consumption.

7. Plaintiff claims that the above application and absolute prohibition are unconstitutional, as the circumstances involved bear no substantial relation to the public health; nor are such incidental sales to be construed as sales to the public generally, and any such application and absolute prohibition under said circumstances, through injunction or otherwise, is an unreasonable invasion by the Defendant of the Plaintiff's liberty of contract and personal property rights protected by

the 14th amendment, Section 1 of the United States Constitution.

8. Plaintiff further contends that if Regulation VII was intended to apply to the circumstances described in paragraph 6 that it should have been worded differently. As it stands, Regulation VII, when applied to said circumstances, is unconstitutional as written. Failure to specify that one cannot "buy" the product is a violation of due process.

9. The small traditional type of farm, such as the one owned by the Plaintiff, rather than concentrating solely on large scale production of one food item as a business with the intention that that item should move in commerce, has throughout the history of this country produced a diversity of food to sustain itself and sold its excess to neighbors and friends in the community. Plaintiff is engaged in this inherently safe, time-honored endeavor, which is not hurtful to the public, but she is being unreasonably denied by the Defendant the use of her land to sustain herself and make a living.

10. Wherefore Plaintiff demands that the court adjudge her constitutional right to sell ungraded raw goats' milk from her farm under the circumstances described in paragraph 6.

Christine Solem
/s/ Christine Solem
Rt. 18, Box 21
Charlottesville, Va. 22901
(804) 973-6505

1836 Polo Grounds Rd.
Charlottesville, Va. 22911
October 20, 1995

Dr. Gordon Guyer, Director of Agriculture
Michigan Department of Agriculture
P.O. Box 30017
Lansing, Michigan 48904

Dear Dr. Guyer:

I would really appreciate it if you could answer my following two questions as soon as possible:

No. 1. How long ago did Michigan adopt the Pasteurized Milk Ordinance?

No. 2. Does Michigan consider the prohibitory language of the Pasteurized Milk Ordinance, which states that only Grade A pasteurized milk, etc , may be sold to the final consumer, to apply to the unadvertised, incidental, on-farm sales of a farmer's excess milk to friends and neighbors?

Many thanks for your time and consideration.

Sincerely,
/s/ Christine Solem
Christine Solem

STATE OF MICHIGAN

John Engler, Governor
DEPARTMENT OF AGRICULTURE
P.O. BOX 30017, LANSING, MICHIGAN 48909
DR. GORDON GUYER, Director

Commissioner of Agriculture
David Crumbaugh
Douglas E. Darling
Shirley A. Skogman
Jordan B. Tatter
Norman R. Veliquette

October 26, 1995

Ms. Christine Solem
1836 Polo Grounds Road
Charlottesville VA 22911

Dear Ms. Solem:

Your recent letter to Director Gordon Guyer has been forwarded to our office for a reply.

Michigan adopted the "Pasteurized Milk Ordinance" in 1966 and since that time we have considered all sales of raw milk to the final consumer to be illegal.

We do recognize that a dairy farmer may wish to provide employees with raw milk. However, we consider the sale of raw milk, incidental or not, to be in violation of Michigan's dairy laws.

We hope this response will answer your concerns. Please feel free to contact me should you need additional information.

Sincerely,
/s/ William E. McCarthy
William E. McCarthy
Director
Dairy Division

WEM:mad

NATIONAL CONFERENCE
ON INTERSTATE MILK SHIPMENTS

10 Tecumseh Trail, Frankfort, KY 40601
Telephone and/or FAX (502) 695-0253

November 6, 1995

Ms. Christine Solem
1836 Polo Grounds Road
Charlottesville, VA 22901

Dear Ms. Solem:

All fifty states have adopted the Pasteurized Milk Ordinance as of this dates.

Sincerely,
/s/ Dan Rackley
Dan Rackley, Chairman
National Conference
On Interstate Milk Shipments

OF THE 50 STATES ADOPTING THE PASTEURIZED MILK ORDINANCE, THE FOLLOWING NEVERTHELESS PERMIT SALES OF RAW MILK IF (1) INCIDENTAL AND/OR (2) LICENSED*

1. States Permitting Incidental Sales of Raw Milk at the Farm:

Arkansas
Illinois
Kansas
Maine
Massachusetts
Minnesota
Nebraska
Oklahoma
Oregon
Rhode Island
South Dakota
Vermont

2. States Permitting Sales of Licensed Grade A Raw Milk

Arizona
California
Connecticut
Idaho
Kentucky
Maine
Massachusetts
Missouri
Montana
New Hampshire
New Mexico
New York
Oklahoma

Oregon
Pennsylvania
South Carolina
Texas
Utah
Vermont
Washington

* Information verified as of 1992, Arkansas-1993